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REMARKS BY JOHN E. HAGAN III,

CHIEF, EIS BRANCH
EPA, REGION IV
ATLANTA, GEORGIA

Good morning. May I call the Conference to order, please. Welcome to the Fifth Annual Environmental Impact Statement Conference sponsored by Region IV of EPA. My name is John Hagan. I am Chief of the Environmental Impact Statement Branch for the Region and I will be moderator for this morning's general session.

As usual, Mr. Sheppard Moore and his staff have done an outstanding job of putting this Conference together. Often he does all the work; I get to stand up here on the platform and share his success. I'd like to recognize Shep Moore at this time and thank him publicly for his hard work in putting this Conference together.

Shep has done his part well. Now it is up to us to make the Conference a success through participation in workshops and an exchange of information, experiences and concerns.

One of the major concerns common to all of us, whether we are EIS preparers or EIS reviewers, is the place that the NEPA process will hold in the new Administration. It is clear that the Administration intends to economize and streamline Federal government programs. It is equally clear that with the national debt ceiling now exceeding $1 Trillion, a review and re-prioritization is in order.

We have with us some key persons representing three key agencies who will be heavily involved in determining the role and priority of NEPA in this Administration. So one of our purposes will be to hear what these people are saying about NEPA in the '80's. Then in the workshop session, we'll have our chance to give them some feedback from our field experience.

Equally important is the communication of ideas and experiences among the attendees. We have representatives from every Federal agency which produced an EIS last year plus several others, I'm sure. We have State and local representatives, including several State A-95 coordinators. We have private industry representatives, consultants, and representatives from environmental advocacy organizations.

You'll note that I did not say "Environmentalists." I would hope that all of us would consider ourselves and each other as environmentalists -- people working within the context of our Agency's mandate or regulatory authority, to get the job done in an environmentally sound way -- people who can objectively evaluate the environmental costs and benefits as well as the dollars -- people who are willing to identify and evaluate alternatives to minimize adverse environmental impacts -- and people who are willing to advocate an environmentally responsible position within our own agencies and companies.

We can learn from one another and we can understand each others' mandates and constraints. This Conference offers an opportunity for you to exchange ideas and "war stories" with your peers from other backgrounds.

I sincerely invite you to relax, enjoy the Conference, participate in the Workshops, and get to know your fellow environmentalists.

REMARKS BY CHARLES R. JETER

REGIONAL ADMINISTRATOR
EPA, REGION IV
ATLANTA, GEORGIA

Good Morning. Welcome to Atlanta and to Region IV's Fifth Annual Environmental Impact Statement Conference. This Conference is held on a recurrent basis to discuss how we can improve our EIS's and the EIS process, with the accompanying benefit that we'll get to know each other better.

We are happy to have representatives of the 25 Federal agencies from which we received EIS's in FY '82. As many of you know, I was head of the South Carolina Bureau of Wastewater and Stream Quality Control, so I am especially pleased to welcome the State and local government representatives. Of course, we are glad to have attendees from industry, consulting firms, and conservation groups, as well as private citizens that share with us a desire to make the EIS process meet the laudable goals of NEPA.

We invited representatives from the various federal agency Headquarters' staffs. These are the people that formulate environmental regulations and subsequent implementing procedures. I felt it was important for them to become acquainted with those who actually have to work with the material they develop. Since there are over 250 people registered, they should receive an earful.

During FY'81, EPA Region IV reviewed and commented on 65 Draft and 75 Final EIS's. But, this is really just the end result of our efforts. Our involvement with most of these projects began years previously when staff members attended scoping meetings and made site evaluations. Through this interaction the quality of the EIS documents has improved dramatically and adverse environmental impacts lessened likewise. If federal actions are going to evidence reasonable environmental sensitivity, getting involved early is the key. My goal is that we work together at project inception to ensure that environmental issues are resolved and there are no unnecessary delays in implementation of environmentally sound projects.

During the past five years, we have reviewed 500 projects at the Draft EIS stage and had environmental problems with less than 30 percent of these. We were able to resolve these problems on all but 48 projects, or less than 10 percent, by the time the Final EIS was issued. Thanks to the spirit of cooperation that is fostered by meetings such as this, the number of Draft EIS's with environmental problems has been reduced about 50 percent during this five-year period.

As you know, EPA assigns ratings for the adequacy of the EIS as well as for potential impact on the environment. Seventy-five percent of the time we have rated the Draft EIS a 2. That means that we feel additional information and/or clarification is required. Is there a difference of opinion as to what should be in an EIS or are my reviewers too hard on you? This is a matter that I hope that you will discuss in the workshop in EIS Preparation and Review.

Recently, EPA's Office of Federal Activities conducted a study of the benefits of the NEPA process in EPA's wastewater construction grants program. This study focused on the environmental benefits, cost, public participation, and changes in projects directly related to the NEPA process. The conclusions of this study are interesting. For those projects for which an EIS was prepared, the recommendations developed as part of the EIS had a very positive impact on the ultimate decision. It showed that through the NEPA process the project's adverse impact on both the natural and cultural environment had been significantly reduced, there was more public input in the project development, and often a significantly reduced project cost. This has been borne out in our experiences in Region IV, for the 11 Draft EIS's that we released this year represent a capital cost savings of $128 million over the original plan. I think this is significant and consistent with President Reagan's Economic Recovery Plan.

In conclusion, I am sold on the EIS process; not just because I support environmental protection or environmental goals, but, because NEPA is such a good decision-making process. A process of analyzing alternatives, consulting with affected parties, getting the facts about the major issues and analyzing their impacts - that, to me, is the way decision-making should occur in a democratic society. The NEPA analysis gets at the heart of the environmental issues that are the most difficult to deal with - siting, natural resource preservation or wise management and utilization, community disruption - those things that cause the most problems in project formulation. So from an environmental protection point of view, even as a regulator, I find a tremendous utility in the NEPA process.

I am extremely pleased that Nancy Nord, Tom Sheckells, and Lance Wood have agreed to come from Washington to address us today. I know that you are eager to hear what they have to say. I encourage each of you to take an active part in the workshops. I hope this Conference will help us improve our efficiency in accomplishing the NEPA process and will result in a significantly improved quality in the human environment. I look forward to meeting each of you personally so please do not hesitate to introduce yourselves to me during the breaks or at the social hour this evening.

The Administrator and the Regional Administrators have developed a list of management goals for 1982. Some of these are closely associated with the EIS process. One of the major goals is improving the quality of the scientific information upon which we make policy, regulatory, and enforcement decisions. Obviously, the EIS process can be a major item in improving our scientific base. Other goals include "the review of regulations," and "reducing backlogs and meeting commitments." In regard to these, I would like to leave one charge with you. It is this - to ensure that we continue to have a healthy EIS review of significant projects, they must be done with minimum administrative processes, close coordination, and in a timely manner.

THE ROLE OF THE NEW CEQ IN THE REAGAN ADMINISTRATION

NANCY NORD, GENERAL COUNSEL
COUNCIL ON ENVIRONMENTAL QUALITY
WSHINGTON, D.C.

I am especially pleased to have this opportunity to tell you about the role of the Council on Environmental Quality in the new Administration. I have been repeatedly surprised, since taking the job as CEQ's General Counsel, to find out from many quarters that I work for an agency that doesn't exist any more. Therefore, I am happy to be able to report to you that CEQ is alive and well, although it is a much thinner agency than it was in the past.

In understanding the role of the agency in the new Administration it is important to look at how the agency has evolved over its 11-year life span. The Council was created to advise the President, the Congress, and the public on environmental matters and to ensure that federal agency decision-making gives full consideration to environmental factors. The Council was created on January 1, 1970, with the enactment of the National Environmental Policy Act of 1969 (NEPA). NEPA is modeled on the Full Employment Act of 1946, which established the Council of Economic Advisors (CEA) and, indeed, CEA and CEQ are sister agencies in the Executive Office of the President. By placing CEQ within the Executive Office of the President, Congress wanted to guarantee direct access to the President, and maintain independence from the mission-oriented line federal agencies. The Council was intended to provide independent policy review with regard to agencies directly administering major environmental programs. Title II of NEPA assigns certain specific duties to the Council and those include:

- providing advice to the President and the Congress;
- overseeing agency implementation of NEPA, including its environmental impact statement requirements;
- developing and improving environmental data and monitoring capabilities government-wide; and,
- assisting and advising the President in the preparation of the Annual Environmental Quality Report to the Congress.

Further, in 1977, the Council was directed by Executive Order 11991 to promulgate regulations applicable to federal agencies concerning implementation of the procedural provisions of

NEPA. The purpose of the regulations was to make the environmental impact statement process mandated by NEPA a more useful tool to agency decision-makers and those regulations went into effect on July 30, 1979. The Executive Order also directed the Council to issue procedures under Section 309 of the Clean Air Act, which established CEQ as a mediator for environmental disputes among agencies.

CEQ, like many agencies, has experienced a substantial staff reduction. There has also been a complete turnover in the professional staff at the agency since the new Administration took office. These two factors have led a number of people to believe that CEQ has been abolished or is about to be abolished. This, of course, is not true and the White House has indicated that it expects CEQ to fully carry out its statutory responsibilities and actively participate in development of administration policy dealing with environmental issues. This is not to say that the Council will not feel the effects of a reduced staff and budget or that it will be able to engage in all the types of activities undertaken by the former CEQ. Instead, we will have to more carefully pick our priorities to guarantee that our limited resources are used in the best possible way.

The Chairman of CEQ is A. Alan Hill. Immediately prior to joining CEQ he was a small businessman in California. He also has experience working for the California Department of Natural Resources. Chairman Hill has been working with the White House to develop the agency's work projects for the near-term future. CEQ's priorities will, of course, further evolve as we get additional direction from the White House and as Council Members develop interests and projects. Of highest priority to the Council during fiscal year 1982 will be carrying out our NEPA oversight responsibilities. I would like to discuss with you CEQ's plans in this regard.

As you all know, NEPA requires that agencies consider the environmental effects of a major proposal before undertaking the activity. In order to evidence this consideration the agencies must produce an environmental impact statement. Congress's guidance to the agencies as to when a statement must be produced and what must be in it was fairly general in its terms. In fact, all Congress said was that a statement must be produced whenever an agency undertook a "major Federal action" having a significant environmental effect. Congress stopped there and left it to the agencies and courts to flesh out those rather bare statutory bones. Shortly after NEPA's enactment, CEQ issued guidelines on environmental impact statement preparation. These guidelines were followed with varying degrees of consistency by the agencies. In 1978, the President directed CEQ to issue regulations, binding on all federal agencies, clarifying the questions of when impact statements must be prepared and what elements of information must be included. The purpose of these regulations was to put some consistency into, and to simplify and streamline the environmental review process. The regulations contain a number of innovations. Some of those innovations are purely cosmetic -- such as the requirement that environmental impact statements be only 150 pages long and be written in understandable English. Some of the innovations are much more substantive and have a real potential for reducing delay and paperwork. For example, the requirement for scoping (40 CFR 1501.7) is intended to provide a mechanism for identifying both important and insignificant issues at an early stage in the process. Tiering (40 CFR 1502.20) is intended to add discipline and reduce possible repetitious analysis when several environmental statements may be necessary. Further, the CEQ regulations direct the federal agencies to work with state and local governments (40 CFR 1506.2) so that the environmental documents produced are adequate for all governmental purposes.

CEQ's regulations have been in effect for just two years. As a new Administration, we believe that it is our obligation to review those regulations to make sure that they are actually working to reduce delay and streamline the regulatory process while still resulting in environmentally sound decisions. We are especially concerned that some federal agencies are not using the flexibility which was built into the CEQ regulations to its fullest extent. Because of this concern, CEQ recently made a public request for comments on how various federal agencies are implementing NEPA (46 F.R. 41131). In our request, we are asking the public for the answers to a number of questions, such as whether the environmental review process has been used to unnecessarily delay a project, whether agencies are requiring more information than they really need from an applicant, whether certain categories of actions can be excluded from environmental review altogether, and whether the agencies are working effectively with state and local governments. If the public is able to give us useful answers to these questions, CEQ is committed to work with the various agencies to revise their environmental procedures in an appropriate manner.

The response we have gotten from the request for comments is gratifying -- we requested that the public submit comments by November 13, 1981. We have received quite a number of comments and I would like to summarize the responses for you. A number of groups have indicated that they will be submitting comments. It is not surprising that most of the comments received have been from business groups. We have also received a substantial number of comments from state and local units of government. I am disappointed that few of the environmental groups have responded to the request as yet. I am hopeful that these groups will be submitting their views in the near future.

Although it is somewhat premature to make a final judgement, based on the comments we have received to date, I can make some general observations. First, there seems to be a consensus that the CEQ regulations are bringing about useful changes in the environmental review process. Several of the business groups commented that the promise of consistency provided by the CEQ regulations is an important goal from the standpoint of a company which needs to make business decisions based on federal agency activity. This promise of consistency has not necessarily been borne out in practice, however.

The comments indicate that the scoping process, in concept, is a useful tool for identifying controversial issues at an early stage. Several of the commentors indicated that the scoping procedures need to be improved. In this regard, the problem of obtaining cooperation from other federal agencies at an early point has been cited. Several commentors indicated the need for clarification as to an agency's obligation to consider issues raised outside the context of scoping and at a later point in the process. Some of the comments do indicate that certain commentors do not understand the correct purpose of scoping and still see it as the first opportunity to discuss the merits of the proposal. Apparently we will have to continue doing missionary work on proper use of the scoping process.

A number of commentors identified the "tiering" concept as being one of the most potentially useful concepts in the CEQ regulations. When properly used, tiering can eliminate much redundant analysis when the agency's review progresses from general programs to specific projects. Another question posed was whether categorical exclusions should be reviewed and possibly expanded. To this question we received an overwhelming yes. The experience gained by living with the regulations for 2 years indicates that it is time to look at the types of review that various activities receive. The Forest Service has recently decided to expand its categorical exclusions. The council has had several meetings with the Department of Housing and Urban Development to look at the same question. We will be encouraging other agencies to begin the same kind of analysis. The request for comments asks questions other than those outlined above. I hope that you will take the opportunity to let us have the benefit of your thoughts on this process.

CEQ's perspective as a White House agency gives it a unique ability to be a cross-cutting agency. Indeed, the members of the new CEQ see the agency's main function as a mediator, facilitator, and environmental problem solver for the rest of the federal establishment. The agency's role as a mediator of enviromental disputes between agencies is spelled out in the Clean Air Act and in Executive Order 11991. Beyond that function, however, the members are convinced that CEQ can be helpful to other federal agencies in identifying potential problems and seeking solutions. It is one of the agency's highest priorities to work with the various agencies to identify those portions of their NEPA regulations that add delays and inefficiencies to the environmental assessment process. The members of the Council strongly believe in the goals of the National Environmental Policy Act. Indeed, we see our efforts to review the EIS process as central in carrying forward the goals of NEPA.

"THE ROLE OF EPA UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT IN THE 1980's"

Thomas R. Scheckells, Deputy Director,
Office of Federal Activities
EPA, Washington, DC

Good Morning! It is a pleasure to be here and speak at Region IV's Annual NEPA Conference.

As I look around the room at the various agencies represented here, I cannot help thinking about all the changes that are occurring in the Federal Government. Indeed, I am sure that this is a topic on everyone's minds. Today, federal policy is being re-examined on a variety of issues. Many of the changes being proposed will affect not only agency structure but the legislation and regulations that govern agency activities. Environmental legislation, such as the Clean Air Act and Clean Water Act, is under scrutiny from a number of entities. NEPA and the CEQ regulations are also coming under review. As most of you already know, CEQ published a Notice in the Federal Register on August 14 requesting comments on 11 items in the CEQ regulations. We are presently developing EPA's response to the request based upon our experience in preparing EIS's and reviewing other agencies' EIS's. We hope that other agencies are planning to respond. This is a good opportunity to let CEQ know your feelings about the regulations and any changes that you would like to see made. EPA would also like to hear your recommendations for reform.

Given all the changes that are occurring in the Federal agencies and possibly the CEQ regulations, those of you who are involved with NEPA must be wondering what your agency's role will be under this statute in the future. Today, I would like to share my thoughts with you on what I perceive EPA's role will be under NEPA in the 1980's.

Before looking into the future, I would like to reflect for a few moments on EPA's experiences with NEPA. Specifically, I would like to address some of the benefits that have been derived from the EIS process.

There is no doubt that benefits have accrued from NEPA and the EIS process. On EPA-prepared EIS's, one important benefit has been the reduction in project costs due to the selection of more cost-effective alternatives. A good example of this is a study conducted on 58 EIS's under the wastewater treatment construction grants program which were completed during 1977 and 1978. The study determined that there was an average reduction of $12 million in project costs due to modifications attributed to the EIS. Original project costs averaged $53 million and EIS preparation costs averaged $50 thousand.

The EIS process has also enhanced the opportunity for public participation in federal decision-making. In the same construction grants study, we found that every EIS provided at least one opportunity for public involvement in wastewater project planning. The most common form of public participation was the public meeting, which was held on 95 percent of the EIS's. This was followed by public hearings, which were conducted on almost 90 percent of the EIS's.

Another benefit of the EIS process is protecting natural resources. For example, as a result of the EIS process, changes were made in the capacity and service area of a municipal sewage treatment plant in Modesto, CA. These changes were made to protect prime agricultural lands.

Finally, the EIS process has encouraged interagency coordination, thereby eliminating duplicative analyses and saving time and money in the environmental review process. A good example of where this has occurred is on a proposed refinery in Alaska. The project required permits from EPA, the Corps of Engineers, Department of Transportation, and the state and local governments. Our Region X designed the EIS for the project so that the analysis met the requirements of NEPA and provided all the necessary documentation for preliminary permit decisions. This departed from the traditional method of processing the permits separately. As a result of this approach, there were significant savings in staff time and administrative costs and reductions in the overall turnaround time for processing the permits. Moreover, the Corps did not have to prepare a separate Environmental Impact Statement for the Section 404 permit.

These illustrate some of the benefits that can be achieved through the EIS process. However, I must be honest in saying that EPA is not without its problems in preparing EIS's. We share many of the same problems as other agencies including:

- Timing, i.e., getting the EIS prepared early in the planning process and avoiding delays;
- Misuse of the EIS process by parties outside the Federal government attempting to kill or delay a project rather than investigate environmental effects;
- Obtaining the necessary funds and personnel to participate in the scoping process and prepare EISs;
- Integrating the Federal process into state reviews; and
- Determining lead and cooperating agencies.

Because NEPA has resulted in both benefits and procedural problems, we believe that the EIS process as promulgated by the CEQ regulations should be reviewed and minor modifications considered in either the CEQ regulations or EPA's procedures. With respect to the procedural problems, I foresee EPA's role in the 1980's as helping to streamline and improve the process. Our goals are to reduce the costs associated with preparing environmental analyses and to expedite the environmental review by focusing on significant issues and early coordination with other Federal and state agencies. I would like to address some of our efforts in these areas.

We are trying to reduce delay through creation of categorical exclusions. EPA is preparing rules which will categorically exclude from the NEPA process certain projects pre-determined to have minimal environmental impacts. An example of a project which would not normally require an environmental review is rehabilitation of existing sewer lines in small communities (3500 or less). I believe other agencies are considering similar initiatives for their programs.

We are also concentrating on preparing areawide assessments. Region III, for example, has initiated an Areawide Environmental Assessment Process for New Source coal mines in West Virginia. The process will minimize the time and effort necessary for the environmental review and processing of NPDES permit applications. Under the process, existing environmental data is used to identify areas with significant resources which are sensitive to new mining. These areas are subjected to the most intensive environmental review under a permit application. For areas identified as less sensitive to New Source coal mining, there is a less comprehensive environmental review. In many cases, applicants can shorten the review period by submitting necessary resource specific data and proposed mitigation with the permit application. The process has yielded three products: an Areawide Environmental Assessment for West Virginia, seven basin-specific Supplemental Information Documents, and a series of 1:24,000-scale overlay maps for the seven study area.

Another way in which we plan to expedite the EIS process is by preparing more programmatic EIS's. For example, Region V is preparing a generic EIS on wastewater treatment planning for rural lake communities. The EIS will address techniques for detecting pollution problems and alternatives to sewering and building conventional treatment plants. The environmental analysis will focus on innovative and alternative wastewater treatment such as:

- Repair and upgrading of existing septic tanks and filter fields;

- Water conservation; and,

- Use of cluster systems (Multi-family filter field located in areas of good soil).

I would like to point out that this generic EIS is an outgrowth of individual EIS's prepared on 7 rural lake projects. The Region V team responsible for these EIS's received the Excaliber Award, which is given annually by Congress to Federal employees for outstanding service. The techniques that the team developed would save billions of dollars in project costs and substantially reduce the environmental impacts for these types of projects.

EPA is making a greater effort to use the NEPA environmental review process to integrate the regulatory review for permitting requirements. This method would save time and money by consolidating the environmental review for the required permits and involving other permitting agencies early in the process. There are a number of ways in which this is being done. For example:

- We are currently negotiating a Memorandum of Understanding (MOU) with the Department of Interior to coordinate EPA's National Pollutant Discharge Elimination System (NPDES) permitting with Interior's

Outer Continental Shelf oil and gas leasing process. The MOU would formalize EPA's early participation in Interior's environmental review process. From the information obtained in the environmental review, we would be able to develop the appropriate NPDES permit conditions early in the lease-sale schedule. Our Consolidated Permit Regulations allow us to develop permit conditions and issue general permits for certain categories of discharges before a sale. As a result of the MOU and the authority under the regulations, EPA would be able to publish final NPDES permit conditions at the time Interior publishes the final notice of sale. This approach would save a substantial amount of time and eliminate a lot of duplicative and costly analysis.

- We are also focusing on integrating the environmental review for the new source NPDES permits with the Corps of Engineers' 404 permits. For EIS's prepared on projects where both a 404 permit and an NPDES permit may be required, emphasis is on identifying the environmental issues relating to both activities during scoping. Attempts are being made to get both the Corps, as the 404 permitting agency, and EPA, as the NPDES permitting agency, to focus on issues and alternatives early in the project planning. Where 404 permits are required, the environmental review would address the selection of disposal sites, including:
    - analysis of alternative discharge sites;
    - identification of preferred sites with conditions for discharge; and,
    - any additional data necessary for a decision on a final site.

The advantage of this approach is that preferred discharge options are identified early in the planning process. Furthermore, applicants are able to determine which alternatives are likely to be acceptable to both agencies and under what conditions; also, what additional data may be necessary for the permit applications. As a result, the project should move quickly through the federal permitting process.

These are some of the efforts that we are undertaking to expedite and streamline the EIS process.

My remarks so far have dealt with EPA-prepared EIS's. I would like to direct attention now to some of the efforts that EPA will undertake in the 1980's to assist other agencies in preparing EIS's.

One area where we plan to provide more assistance to agencies is in the scoping process. EPA strongly supports scoping as a means to expedite the environmental review and use federal resources (dollars and staff) more efficiently. We believe scoping also leads to better decisions because it helps agencies focus their attention on the really important environmental issues.

To assist the parties involved in scoping, we are preparing scoping documents on a number of projects, such as:

- Coal conversions
- Disposal of hazardous wastes
- Small hydroelectric projects
- Railroad mergers
- New coal port facilities, and
- Oil shale development

The documents will focus on key environmental issues and mitigating measures. We hope that these documents will help parties avoid some of the conflicts that have occurred in the past during scoping.

In the coming years, EPA intends to participate more as a cooperating agency. In the past, fiscal constraints and other priorities limited our participation in the preparation of other agencies' EIS's; however, our FY-82 budget does provide some funding which will allow us to function more fully as a cooperating agency on major energy and industrial projects. We believe that this cooperative effort is especially effective in expediting projects requiring an EPA permit.

EPA has also set up a Priority Project Tracking System. This system was developed by our Permits Coordination Group to monitor selected major energy projects. Under the system, deadlines are set for permitting and environmental reviews. Our goal is to ensure that the permitting process proceeds at an orderly pace and that environmental problems are identified early enough to avoid delays.

Finally, we are undertaking a mitigation study in which we examine the mitigation policies and practices of other federal agencies. By studying how other federal agencies apply mitigation, we hope to pinpoint the strengths and weaknesses of their approach. We are contemplating using this knowledge to develop a comprehensive document which can be used by EPA and other federal agencies in determining mitigating practices for particular activities. The first stage of the study, just completed, focuses on mitigation within the Forest Service, Fish and Wildlife Service, and Federal Highway Administration. The study will later be expanded to include other agencies.

I have been expounding at length about EPA's experiences with NEPA and what our role will be under this statute in the future. I would like to conclude with a few general remarks about NEPA and any potential revisions of this statute.

I believe that NEPA is one of the most significant pieces of environmental legislation to come out of Congress in the last 15 years. In the last 10 years, federal agencies have made a tremendous effort to respond to this statute. Based on those years of experience, we must now consider what changes are needed to improve further the NEPA process. We must assist CEQ in the review of its regulations and exert the effort necessary for change.

In the coming years, those of us in the federal government will be seeking to achieve the mandates of NEPA in ways which are commensurate with Administration policy. With a creative approach, I am sure we can achieve harmony. In this way, I am confident that NEPA will continue to play an important role in formulating agencies' decisions.

Thank you for the opportunity to speak to you today. Are there any questions?

"NEARER TO THE HEART'S DESIRE: FINE-TUNING NEPA"

Lance Wood, Assistant Chief Counsel
Environmental Programs, Office of the Chief of Engineers
U. S. Army Corps of Engineers, Washington, D.C.

It's always a pleasure for me to attend a conference like this of my fellow environmentalists. I've noticed over the years, as I have attended more and more such conferences, that if you listen carefully and watch, these conferences demonstrate, in many subtle ways, how thoroughly institutionalized environmentalism is now! This is especially so in the Federal Government by virtue of numerous statues and some relatively new agencies, such as the EPA and CEQ.

However, I sometimes find that to maintain my own level of interest, when I have a chance to speak at a conference like this, I like to play the roll of a gadfly to try to stimulate some discussion and raise some questions, even though I fully well realize that, undoubtedly, many people will disagree with some, or all, of what I am going to say.

With that role in mind, I'd better give sort of an exculpatory disclaimer to protect my agency because I have not had my extemporaneous remarks reviewed by anybody in the Corps of Engineers. Sort of like a general a couple of days ago, as I recall. I want to point out that everything that I say here will represent my own views of the moment. I'm always willing to learn and change my views and they do not necessarily represent the views of the Department of the Army, the Corps of Engineers, or our Chief Counsel. There is a long list but I will stop it there. That sort of disclaimer gives me a heady feeling of freedom so I can say more or less what I want to, within some limits, though I'll try not to be too outrageous.

First, though, before I start talking about these questions that pertain to NEPA and the EIS process, I want to very quickly give a little introduction to those of you who don't know very much about the Corps of Engineers. Now what is the Corps of Engineers? Many of you have had little or no experience with it. People don't always know that we are sort of a bifurcated agency, i.e., we are half military (military construction for the Army and the Air Force all over the world); we are half civil works (building water resource development projects), and also in the Civil Works Directate, conducting a regulatory program, giving permits before anything can be done in practically any water of the United States now under federal jurisdiction.

many people are puzzled as to why a division of the U.S. Army should have any water resource development or regulatory responsibilities. The answer is simply a matter of history. In the early days of this Republic, the Congress and the President saw a need for engineers to build the national road and to start developing our rivers and our ports. The only engineers available were those in the Army, especially those produced by that fine engineering institution, the U.S. Military Academy at West Point. It was founded by the Corps and sustained by the Corps for all these years; and visa versa, of course. And Congress has never seen any reason to switch for obviously good reasons. That probably explains why the Corps of Engineers has a small but very effective historical division. We really do! We have a few historians in our little historical division. An agency that was spawned and exists by virtue of history, such as we do in some sense, logically would have an historical division. However, when I started reading the monographs and publications of our historical division, I found that even a Corps employee such as myself was surprised by some of the remarkable things that they have turned out.

Now, offically speaking, the history of the Corps begins in 1775 with the Battle of Bunker Hill, but the Historical Division has shown that its history, in fact, goes back far beyond that. In fact, the origin of the Corps, they have proved, are shrouded in the mists of pre-history - the stuff of myth, epic and saga. For example, one of the historical divisions' monographs has proved that it was the Corps' Civil Works Directate which diverted the great river with which Hercules cleansed the Augean stables: in ancient Greece. Some say that when the water resources work got a little sparce during one period the Corps built the great pyramids of Egypt. I don't say that our motto is "keep busy." Some people maintain that, but it obviously is not true. But that is clearly disproved, in fact, by the monograph on the pyramids. They had many useful functions which we have just forgotten about over the years.

The most interesting monograph was by the Hebrew studies division of our historical division, because they managed to find an old previously unknown version - the original version of the book of Genesis - and their translation from the Hebrew shows that it really goes like this in the first chapter: In the beginning, God created heaven and earth; and the earth was without form and void, and darkness was upon the face of the deep. So God created His construction and engineering agency-the Corps of Engineers, and God said, "Let there be light." So the Corps of Engineers constructed great hydropowered dams with great dynamos generating electricity - and there was light. God saw the light from the hydropowered dams and said, "This is very good." That was the evening and morning of the first day. And God said, "Let there be a firmament in the mist of the waters and let it divide the waters from the waters." So the Corps of Engineers built flood control levees, and it was so. And God called the firmament Heaven, the evening and morning of the second day. And God said, "Let the waters under the Heavens be gathered together and let the dry land appear." So the Corps received a supplemental appropriation and built flood control dams and it was so....

Now, I'm going to stop there, even though the book of Genesis continues. In our translation, it becomes tragic soon thereafter because much of the creative work that Jehovah and the Corps of Engineers were going about in partnership was then enjoined for lack of an adequate Environmental Impact Statement. We call that the fall from grace, or original sin. There are at least two controversies, however, on which our historical division is still working. The first one is, is it or is it not true that it was the Corps of Engineers which built the Colosseum and the Circus Maximus in Rome where devout environmentalists were fed to lions? NO! They proved that is not the case. The other question is , "What is the explanation for the great flood of Noah?" Well, our historical division has shown that it was a dam failure that caused the flood, but that dam was built by the Bureau of Reclamation.

All right, enough of this madness. We came here to talk about NEPA and the EIS process. So, of course, I have to begin by stating what is very obvious: the Corps of Engineers feels that the NEPA process and the EIS process are very good things. They are necessary and desirable parts of our planning process. We have thoroughly institutionalized NEPA within the Corps of Engineers for major construction projects, civil works or military. With the long lead times involved in Federal projects we can obviously benefit from the careful environmental review such as that required by NEPA. It ensures proper consideration of all alternatives and all significant potential environmental impacts. But, as I have said, I don't believe that I need to be here in order to conduct a sort of cheering section for NEPA. I don't think NEPA needs a cheering section. It's thoroughly institutionalized; it's firmly established and supported, as Ms. Nord has pointed out, by the Reagan administration. So my subject is,"What are some remaining problems in NEPA? How can we fine-tune NEPA to make it work even better and be more valuable than it is at present?"

Now, if I were to begin my remarks by talking about Corps of Engineers construction projects, either civil works or military, I might be accused by some unsympathetic and unkind people of special pleading. Now, I reserve the right to do some "special pleading" later, or at least to say some things that might be construed as special pleading for the Corps' own difficulties in our construction projects. But, let me begin, instead, to clearly establish my bona fides here as an objective observer of all this. I will express first some of the concerns which I hear week in and week out from private sector applicants for Corps of Engineers permits under Section 10 of the River and Harbor Act of 1899 for any structure in, or affecting, any navigable water; and Section 404 of the Clean Water Act, for the discharge of dredged or fill material into any water of the United States subject to Federal jurisdiction.

To begin, I'll speak only from the perspective of permit applicants and I will not necessarily present my own prejudices. But, when I try to explain how these private sector permit applicants feel about the NEPA process and the EIS requirement, I'm going to be quite honest with you. They are very hostile to it sometimes; frequently, in fact, they are very fearful of it. Why? When we environmentalists here know what great things NEPA and the EIS requirements are? Well, I'm afraid that, in a sense, statistics tend to tell the story of why so many private sector applicants for permits can be somewhat suspicious to say the least. That is, when you realize that the average time it takes for the Corps of Engineers to process a permit application that does require an EIS is 36.1 months, and the average time it takes the Corps of Engineers to process a permit application that does not require an EIS is 4.2 months. Now, that is a noteworthy contrast and the permit applicants are fully cognizant of that. There is an obvious caveat here - the Corps of Engineers only requires an Environmental Impact Statement for something less than 1% of the vast number of permit applications that come in yearly to the Corps, and those cases tend to be the more difficult ones. They are either controversial, by which I only mean that, frequently, there is some party that opposes this permit and that party has enough money to hire at least one lawyer; or they are projects where there are real environmental questions to be resolved and alternatives to be discussed. Nonetheless, despite that caveat, from the parochial perspective of the private sector permit applicant, when he realizes that the average length of time it will take him, if an EIS is required, is more than 3 years, you can understand that, with money costing what it does nowadays; with the stability of financing being something less than like the rock of Gibraltar; with changes that take place in every aspect of this gentleman's operation in 3 years - in fact, sometimes people retire and go out of business before their application is resolved; some people die - you know you can understand that 3 years is a long time. That is the point.

Now, I'm going to tell you a story that may sound a little outrageous, but I assure you that it is completely true. It points out in graphic terms the feeling, the heat generated by our requiring what the law seems to require, that a permit applicant be subjected to, and should complete, the EIS requirement in processing a permit.

In December of 1980, we were in the transition period between the Carter administration and the Reagan administration and I was invited as the only attorney to attend a big meeting at the Office of the Assistant Secretary of the Army Civil Works. We call him the ASA(CW). He is the civilian boss of the Corps of Engineers; the military boss is the Chief of Engineers, and for the military side of the house, of course, the Chief of Staff for the Army. But, this was the Civil Works side because this was a permit matter and the ASA(CW) was our political boss. The subject of the meeting was a permit case. A bunch of private citizens in this country and some corporations wanted to develop an oil refinery in a Southern state which shall not be identified. They thus needed one or more Corps of Engineers permits because they had to have a pier for the ships to come in and off-load the oil. They needed a pipeline as well. They needed fill material for these things, structures in navigable waters. They needed Corps of Engineers permits. The question the meeting was concerned with was, "Will the Corps, or will not the Corps, require this permit applicant to do an EIS; that is, will we do an EIS for this permit application?"

Now the District Engineer, who is the first level of responsibility in such a question, had noted that the state government and the local government and practically everybody of political standing in that state was strongly supporting the granting of the permit and the building of this oil refinery. It had all the necessary water quality and air quality permits, but, on the other hand, land owners in the area, including some wealthy land owners with large estates, didn't like the idea of an oil refinery in that neighborhood because, no matter how good we make oil refineries, they are just not what you want to be next door if you have a big rustic estate in a rural area. People in such areas like to maintain a quality of life there as they know it. Now they are suspicious of things like oil refineries. You can all understand that. So when the District Engineer put out his notice saying that he tentatively did not think an EIS was required in this case because all the environmental questions probably had been resolved and there would be no significant impact on the environment, the local environmentalists got together and came for to assistance to the Deputy ASA(CW), who was sort of the environmental watch dog, unofficially, for the office of the ASA(CW). They talked with him and he wrote a letter and sent it down to the District Engineer (a very extraordinary action) saying, "Mr. District Engineer, I've heard about what is going on here. My Goodness, we're talking about an oil refinery. Oil refinery = EIS, you know. Who would think seriously of giving a permit for an oil refinery without an EIS?" The letter strongly implied that the District Engineer should write an EIS for this oil refinery.

Well, this upset the applicant and so he requested a meeting at the office of the ASA(CW) in Washington. I got to attend the meeting as the one lawyer present. The flagship, you might say, of the meeting was a very senior senator. To understand the story, you must remember he was a Republican, a senior Republican senator - he was the leading light of this meeting. The Congressman from the district, the Chamber of Commerce representatives, and the representatives from the oil refinery company and so forth also were present. They had a large delegation of at least 20 or more on that side; and on our side we had the ASA(CW), his deputy, the District Engineer, and me. The meeting was a remarkable meeting and it was long.

We started with the Senator and the Congressman and everybody else giving a presentation to explain why, if we required an EIS in this case, we might as well be denying the permit because it would take a long time to write the EIS and a long time to resolve the questions of adequacy. They knew this from prior experience in building other oil refineries. Supposedly, they said, if you require an EIS it will kill our project. We need this oil refinery. We need jobs in our community. You can imagine the arguments which they presented very forcefully. The ASA(CW) spoke and he said, "Well, look, we're not at fault here Senator. We don't write the laws; that is done in Congress. But NEPA requires, from our point of view, an EIS for this case." Then they all turned to me and said, "Mr. ASA(CW) you've made a legal determination there. What does your lawyer say about that?" They all looked at me and I did the lawyerly thing in such a situation. I'm sure those of you who deal with lawyers see it every day. I said, "Well, on the one hand, and then, on the other hand." "Well, on the one hand, the decision of the District Engineer will decide whether an EIS is needed. Here, in this letter that we have from the deputy ASA(CW), is some interesting, nice advice, but the delegation has been made to the District Engineer to decide, in his discretion, whether or not an EIS is needed in this case. I'm quite confident that the Deputy ASA(CW) did not intend to interfere with that discretion since he has not chosen to remove the delegation. But, on the other hand, I have to advise you gentlemen from the oil refinery that, the way cases stand, the way the law stands in a situation like this, it is safer to write an EIS because you will be subjected to a more stringent, difficult standard of judicial review when these environmentalists sue, as they undoubtedly will, if you were to be granted a permit with only an environmental assessment and a finding of no significant impact. Then you just might be overturned by the federal courts for failure to comply with the procedural aspects of NEPA." They heard that and they looked at each other. Of course, I had done what I had needed to do. They were thinking, well, on the one hand; then, on the other hand. They were trying to figure out what I had said.

Then they redirected their fire at the ASA(CW) and his deputy - they were the lightning rods again. I had carefully avoided being a lightning rod myself. What happened then was truly remarkable and I've never seen anything quite this interesting in my years in the federal government. After the ASA(CW) had finally said, "Alright, I have explained to you, Senator, and Congressman," and he addressed them all, "that you need an EIS in this case. We can think about it, but that is our conclusion ." So the senior Senator stood up and he advanced toward the ASA(CW), who also decided it might be a good idea to stand up. He did stand up and so the two of them faced each other and the Senator reached out to shake the ASA(CW)'s hand. They did shake hands but, as they were shaking hands the Senator said, "I have listened to you for well over an hour and a half now and I'm not going to waste any more of my time with you." He said, "You are a lame duck; you are a 'has been'. You and your people have not done any good for this country in your time here. You know, it's good riddance to you. Go on back to New York where you came from." He said, "You know we need this refinery; we need these jobs. You won't help us out, so I've got nothing else to say to you. Good riddance!" Then he walked over to his deputy, the Deputy ASA(CW), who is a smaller man than the Senator, and you could see the deputy sort of brace himself for the storm. "And as for you, sir," the Senator said, "the same thing applies to you, and doubly. Aren't you another one of these political appointees? Aren't you with this discredited Administration that is about to be swept out of office?" The deputy said, "Well, sir, I am with the present Administration". He said, "That is what I thought. Another one of you political hacks! Go on back north to where you came from. Go! Good riddance to you!"

Then the Senator began his majestic march toward the door, followed by the Congressman and all the others, like destroyers behind the flagship, but unfortunately my chair was between the Senator and the door. When the Senator reached me he stopped, with an afterthought, and shook my hand and said, "Mr. Wood, I realize that you are not a political appointee, you are a career employee of the Corps of Engineers and so you have some credibility in my eyes. But I'll tell you one thing, sir. I'm not entirely sure where you came down on this question, but if you do agree with those guys then you ought to go, too!" Well, we all were a bit shocked and the Senator went sweeping out majestically with everybody behind in a flurry. The ASA(CW) had a thought and he went to his desk and grabbed a little package of pecan nuts that the Senator had given him as a little gift, as a token of his southern state. He ran after the Senator and said, "Senator, do you want your pecans back, too?" The Senator said, "No, you can keep the damn pecans!" Now, the point of this story - you may feel that there is a great deal of chaff in that story, but there may be a grain of truth, too. The conclusion I'm getting at is that many private sector permit applicants are not entirely happy when you tell them that their permit application must be accompanied by an Environmental Impact Statement. I'm going to be so bold as to suggest that maybe, just maybe, they have a point.

The question I want to address to you is, though I can't answer it now (I'm not going to try to answer it now), how can we expedite this EIS process? How can we be sure that we can have EIS's without fierce resistance? How can we give a greater incentive to District Engineers, for example, to conclude, yes-let's write an EIS - so the District Engineer can feel that, if he does, he will not effectively be denying the permit. This is an allegation made by the permit applicants, but goodness, you have to consider that after you hear it dozens of times from permit applicants.

Now the CEQ/NEPA regulations presently have two provisions, at least which allow EPA, and in other cases CEQ, to expedite the NEPA process in certain defined ways. I think we need to take a careful look at that and see, first, can we expand upon that, go into more detail, have a more expeditious treatment of permits and all the laws that inter-relate in the EIS process? Second, can we perhaps delegate to federal agencies greater responsibility to establish their own expeditious or expediting procedures so that it doesn't take so long to prepare EIS's? We have some ideas in the Corps but I'm not going to surface them now so that there will be holes at this point, but I do think that is a subject which deserves some attention during the next day or two as you attend this meeting.

Now, to go to a few specific problems, just to give you a few specifics to work with, let's take the case of a pipeline or an electric transmission line or a road which is not being built by the federal government but is being built by the state or a private company or whatever. If this pipeline or transmission line crosses any stream, any water of the United States subject to federal jurisdiction, then they have to get, as a general rule, either a Section 10 permit if it crosses a navigable water; or a 404 permit if, as they normally do, they have to put fill material in practically any water subject to federal jurisdiction. Now during the Carter administration we had a big dispute over this. The CEQ of the Carter Administration said emphatically, "Corps of Engineers, whenever you have a case like this, there may be a 500-mile long pipeline that may cross one tiny stream, but before you can grant that one permit, Corps of Engineers, you have to write a full scale

Environmental Impact Statement on all the direct and indirect environmental impacts, not only of the stream crossing but of the entire length of the pipeline. What is the gas going to be used for at the other end? What lands will it cross in its 500-mile length?" We thought that this was a little extreme and we did not agree.

The CEQ, during the Carter Administration I emphasize, was very adamant that we had to write these EIS's for the entire length of the pipeline, the transmission line, or the state road. But if you read the CEQ/NEPA regulations, you can see that they had some sort of more or less reasonable case for contending that the definition of major federal action includes actions with effects that may be major and which are potentially subject to federal control and responsibility. If the test is what is "potentially subject to federal control or responsibility," that's extremely broad. Obviously this pipeline was subject to Federal control because they could not exist without a Corps of Engineers permit.

If you look at the CEQ regulations' definition of effects it includes, "Indirect effects which are caused by the action and are later in the time, or further removed in distance, but are still reasonably forseeable." So the CEQ said, "But for the Corps of Engineers permit to cross this water, there could be no pipeline, no transmission line. It's potentially subject to federal control, so you've got to write a full scale EIS on that. Well, one of the indirect effects of being able to cross a body of water is that you can have a 500-mile long pipeline or a transmission line and, thus, we have proved that you must write a full scale EIS on the entire length."

Now this dispute involves much more than simply the matter of writing an EIS because, remember, the Corps' public interest review is, in part, based upon what this EIS reveals. So, we would be making our permit decision on whether or not to grant the permit for this water crossing; not on the basis of the effect of the water crossing, per se, but on the basis of whatever that EIS revealed about where the gas came from, where the electricity is going to, what happens over the 500-mile length, what lands will be crossed, i.e., Indian reservations, what is going to be crossed. So you see, it is an extremely important question; it was not a purely technical debate.

We resisted, as I say, and this led to the case of the Winnebago tribe of Nebraska versus Ray, where the 8th Circuit Court of Appeals agreed with the Corps of Engineers, and disagreed with the CEQ, and ruled that the Corps need only look at the water crossing and not write a full scale EIS on every aspect of the pipeline or transmission line. But this is still a very open question because that case was decided on the basis of the old CEQ/NEPA guidelines. The Court specifically said the case was not decided on the basis of the regulations. So it's still an open question that has not been resolved, though the Corps is at present relying on and following _Winnebago Tribe of Nebraska vs. Ray_.

I'll quickly mention a related problem. It is the generic problem, as you can see, where there is a very small federal handle. Frequently, it is a Corps of Engineers permit and that federal handle is used, or can be used, to lead to a full scale EIS treatment and major federal involvement - in fact, potential federal control of the entire activity. Now, we thought that was unreasonable in the case of the private pipeline, transmission line, or road, but it is a more difficult question, isn't it, when you are talking about an electric power generating plant or a big industrial facility or a big oil refinery where there clearly would be no EIS required, very little federal NEPA involvement except for the Corps of Engineers permit for the pipeline, the pier, the water crossing, or whatever the case may be. Well, one approach to this question was taken by the 5th Circuit Court of Appeals in _Save the Bay vs. Corps of Engineers_. This court said that in very limited, particular and circumscribed circumstances these the Corps did not need to write an EIS on the whole big chemical plant, but only concentrate on the fill material around the effluent pipe. But on the other hand, that is a very restricted decision. I am not at all sure that that is good law, so these are matters that need to be thought about, need to be addressed, and I am sure that our CEQ is going to be thinking about these things. Who knows, it may even be addressing them. Well, I'm sure they will be addressed to whatever extent they can be addressed by the CEQ/NEPA regulations. That is a very separate question. I did not mean to be sarcastic there at all. The CEQ/NEPA regulations can only do a limited amount to change the minds of federal courts. The federal courts ultimately determine what NEPA means. The CEQ/NEPA regulations are very persuasive evidence to which the federal courts give deference in deciding what NEPA requires, but I'm not trying to shift responsibility to CEQ. They can be very helpful, but I don't maintain that they can ultimately solve all the problems of NEPA. I'm afraid that they certainly cannot. The federal courts are ultimately responsible and the Congress, of course.

Alright, just a few more observations about matters that affect both permit cases and federal projects, specifically Corps of Engineers projects. We had an interesting inquiry the other day from the House Armed Services Committee. They asked, "Why did the Department of the Army spend $300,000.00 to write a full scale EIS on the ongoing operation of the US Military Academy?" "For what possible reason," they asked, "do you need a $300,000.00 EIS on the operation of a college?" Let me say first that when I heard about that Congressional inquiry it was the first I had ever heard of this matter. The Military Academy puts out lots of Corps of Engineers officers, who do have some impact on the environment in the long run; favorable, of course. Nonetheless, they asked my advice. "Was this legally required or not? When I started looking into and thinking about it, I'm not at all sure that I would have advised - had I been asked by the Commandant of the Military Academy - that the Academy should write an EIS. But I can certainly understand why he might have done it.

Once again, look at the definition in the CEQ/NEPA regulations of major federal action. It seems to mean practically any and every federal action, and in some cases a failure to act can be a major federal action. These actions are specifically defined to include new and continuing activities. Then when you look at the definition of "significantly", you find that it is extremely inclusive and also very subjective. So, as a result, you have what I believe is an interesting problem. That is, and I'm not saying that this is necessarily what happened in the case of the Military Academy, but the problem that I wanted to address is the writing of defensive EIS's. EIS's that really may not be necessary from any common sense point of view, but which are written at great federal expense for defensive reasons.

As my collegues have suggested from this rostrum today, sometimes people bring lawsuits based on EIS's, not because they are interested in the environment, but because they want to stop the action. Consider the forces that are at work upon a federal decision-maker deciding whether or not to write an EIS. It may really not be necessary from any common sense point of view, but he has a dilemma. If he says, "Yes, write the EIS, despite whatever it may cost," it will cost a certain amount of money, but it is not his money. It will lead to some time delay, but frequently it won't lead to any delay at all because many actions are continuing actions for which there is no injunction outstanding. Many other actions have very long planning lead times so there is no delay for them. So there is a big 'up' side, as the cliche' says, to writing the EIS. Well there is not too much 'down' side. If he decides not to write the EIS, there is a very real probability that, in any half way doubtful case, if anybody brings a lawsuit, his activity can be enjoined. That is a terribly disruptive and disgraceful thing to happen to your federal official - to say that he made the wrong decision and he has been enjoined. So federal officials, I believe, tend to err on the side of caution. If there is any doubt, and there is almost always some doubt, they write an EIS.

Now, this may not be a bad thing. After all it may be that the costs of doing EIS's, even maybe a few unneeded EIS's, are balanced out by the benefits of those EIS's which otherwise would not have been written but for this defensive EIS situation. Also, we realize that there may be a valuable economic pump priming effect here. We know that since 1969, a major U.S. growth industry has been consulting firms that write EIS's. Nonetheless, I will say that we are moving into a period of austerity where the federal government does not have enough money to fund everything that might be nice or might be useful for defensive reasons. You've got to remember that when you spend $100,000.00 on an EIS here, and a half million dollars on an EIS there, as Senator Dirkson used to say, "Before long, that adds up to real money." I'm convinced that NEPA and the CEQ regulations can be fine tuned to reduce the need for writing defensive and unnecessary EIS's. I think this is another subject for discussion today and for months ahead as we re-examine the NEPA process as implemented by the CEQ.

Now, I am going to move, just briefly before I close, to a matter which I admit some unfair and unkind people could regard as special pleading. I'm going to tell you a little bit about the most recent learning experience the Corps of Engineers had with a Corps of Engineers project regarding NEPA. That is sort of a euphemism. It was really more like shock therapy. That was when the 5th Circuit Court handed down a decision on July 13, 1981, on the Tennessee-Tombigbee Waterway. Now, almost all of you have probally heard of the "Tenn-Tom" project. Some of you may even think - I hate the thought - that maybe the project should never have been authorized. Some of you may even think that construction should not have begun. I don't feel that way. I think it a very good project and it is more than 60% completed at the present time. But, you need a little bit of history to understand how we ended up with the recent 5th Circuit Court opinion.

The "Tenn-Tom" project is a big project. It will stretch 253 miles in length. It will connect the Tennessee River with another existing major waterway, the Black Warrior-Tombigbee Waterway, which then flows on to the Gulf of Mexico at Mobile. It's the biggest civil works project the Corps of Engineers has ever undertaken. It is going to cost over one and a half billion dollars before we are through. It was authorized in 1946 and not until 1969, the year that NEPA was enacted, did Congress appropriate money for pre-construction planning. So the Corps of Engineers generated an early Environmental Impact Statement, published in 1971. It was based upon the best plans and information available at the time. But remember, the project had no advanced engineering and design; we only had what you might call the rudimentary plans for the project. Congress debated this EIS and debated on whether or not construction funding should be appropriated. And having debated the EIS and the project at great length, Congress appropriated construction funds in 1971. We were off and running by direction of Congress, building the "Tenn-Tom" Waterway.

Now the 1971 EIS promised that there would be extensive environmental studies as we went along because it takes a long time to build a 253-mile long major waterway. It is a project which is frequently compared to the Panama Canal. It is a big project. Now I might say that we had, almost immediately, the first NEPA lawsuit which tested the original EIS. Judge Keady, a learned trial judge, heard all the evidence in a hearing, studied the record, and concluded that the 1971 EIS was adequate under NEPA. The 5th Circuit of Appeals Court unanimously affirmed the adequacy of that 1971 EIS. The Supreme Court declined to hear the case. Hence, since we had an adequate EIS, the Corps of Engineers proceeded to conduct all the environmental studies we had promised. In 1975, the first 9 big, thick volumns, a whole bookcase of supplemental environmental reports, were ready. The Corps had to decide whether to file these things as a supplemental EIS, 9 volumns worth, or some aspect thereof, or not.

Well, I want to point out here - don't think I am expressing a personal bias - I didn't even come to work for the Corps until 1976, over a year after the decision was made, and I had no environmental law responsibilities until a year and a half ago, long after these decisions were made. So I am not simply justifying my own errors from hindsight when I say that the Corps of Engineers honestly decided in 1975 that these first 9 volumns of supplemental environmental reports had revealed no significant environmental impacts that had not been adequately addressed in the 1971 EIS. At that time the CEQ only had guidelines out to implement NEPA and those guidelines were very permissive on whether or not you needed to file a supplemental EIS. It was more or less whether you wanted to or not. So they concluded in 1975 that no supplemental EIS was needed for the "Tenn-Tom". When the next 9 volumes, for a total of 18 volumns, of further environmental studies became available the Corps honestly drew the same conclusion again. We have done a lot of studies, but we have revealed no new significant environmental impacts from this project.

Remember that the Corps was designing the "Tenn-Tom," openly, as a showcase for NEPA. All the Corps' public relations presentations said that we are going to make this the most environmentally sensitive and responsible project in its design and construction ever undertaken in the United States. We did our best, in all honesty, to fulfill that promise which we made to Congress and to the public. We had an independent board of environmental consultants that reviewed all the significant plans. Largely at their recommendation, the Corps of Engineers modified the design for this project and continued to make some changes in the project. We had a rudimentary plan in 1971, but by the time we were really deeply involved in doing the digging years later, we decided to change some aspect of the project, primarily to enhance environmental quality. For example, the original plan had a perched canal for the midsection of the project, a canal between two levees. The board of environmental consultants said that it would be much better for the environment if you changed that into a chain of lakes. It will be good for recreation, fishing, and boating; it will be good for fish and wildlife; it will be good for aesthetics; it is, in every way, better. So we changed from the perched canal to the chain of lakes largely, and primarily, to enhance environmental quality. The environmental consultant board said also, "You are going to need more land than the 70,000 acres you guessed you would need in 1971. Why? Because that will be a more environmentally responsible way to dispose of the dredged material. You'll also have more recreation lands; you'll also be taking more land in fee, so that you can then have complete control of the fish and wildlife benefits thereon, etc." So, largely and primarily to enhance environmental quality, we acquired, not 80,000 acres as we had projected in the original plan (70,000 project, 10,000 recreation), we went from 80,000 to 107,000 acres - not a vast difference when you think of a project of this scale.

Other changes: we decided to make more cut-offs in the river section for efficiency. Admittedly not entirely for environmental reasons, but we proved in our supplemental reports that these cut-offs would have no adverse environmental impact - certainly no impact not discussed in the 1971 EIS. We had more knowledge as the years went on. We spent so much money on environmental studies and we generated vastly more knowledge.

All right, the Corps decided that they did not, as you recall, have to file a supplemental EIS. To say in all frankness, another factor that might have been considered in that decision was that there was this first, long lawsuit on the adequacy of the original EIS- the lawsuit between 1971 and 1974 over the adequacy of the 1971 EIS. So for all I know (though I have no reason, except speculation, to say that) the Corps may have said, "Well, look. If we write a supplemental EIS we could have another lawsuit on the adequacy of it, but since we are not in any sense legally required to do a supplement, why should we go asking for another major lawsuit like the one that took so much money and time between 1971 and 1974?" All right, no supplemental EIS was being prepared for the "Tenn-Tom". We didn't think we needed to, legally, morally, or for any other reason, but in 1976 there was a new lawsuit.

This time it was filed by the Louisville and Nashville Railroad. Part of the Family Line System, it is a big and well funded outfit. This lawsuit was not based on environmental concerns, it was based on authority questions. It was an authorization lawsuit. They alleged that we did not have legal authority to build the project in the way that we were building it. However, any good lawyer, in bringing a lawsuit, throws in every complaint he can imagine, even those of the barest colorable validity. So they threw in a host of environmental claims as well as many NEPA claims and Endangered Species Act claims, Clean Water Act claims. The guts of the lawsuit was over authorization. If you'll pardon my sounding cynical, I really don't believe the L&N brought that lawsuit because they wanted a perfect EIS or were concerned about the environment very much. They stated they were concerned about the competition the waterway would provide - competition in an area where the L&N practically has a trade monopoly. Well, there were many, many counts of the lawsuit and the first trial was based on authorities questions. The L&N lost. The 5th Circuit Court unanimously said the Corps had won another round. The real essence of the lawsuit, the authorities question, was settled in favor of the Tenn-Tom project.

We had to go to the remaining counts, most of which looked very, shall we say, questionable in validity, to say the least. The same trial judge had been dealing with the "Tenn-Tom" since 1971, Judge Keady was very familiar with the case. He examined all the evidence and handed down a ruling which said clearly, " The Corps of Engineers again had done everything any agency could possibly, reasonably do to protect and enhance environmental quality. It had fully complied with NEPA. No supplemental EIS was needed and it hasn't segmented the project improperly." He responded to all of the charges of the many that the plaintiff had made. One, among many, and not a very significant one from anybody's point of view at that time, was the question of whether or not we needed to file a supplemental EIS. There were many questions much more hotly contested than that. Then, surprise! Surprise! On the 13th day of July, when we were all expecting the 5th Circuit Court to unanimously affirm Judge Keady again as they had done twice before, here comes a decision which is amazing. When you read that July 13, 5th Circuit decision and you compare that to Judge Keady's decision, you wonder if they were looking at the same fact situation, the same record, the same project.

Now, there were many reasons for this which I am not going to go into now. It would sound too much like 'after the fact' rationalization, but I will say one thing. There was one basic difference between what Judge Keady held and what the 5th

Circuit Court held. That was what I believe to be, in essence, a new rule that the 5th Circuit Court came down with in this "Tenn-Tom" decision. That is this and I am going to quote it (to summarize it), "You've got to write an EIS for an action that is beneficial to the environment. A beneficial impact must be discussed in an EIS so long as it is significant Federal action. NEPA is concerned with all significant environmental effects, not merely adverse ones." Well, this is an interesting rule they had. In a case of many years before, the Hiram Clark case, which had never been cited again so far as I know, by anybody, which had been generally forgotten, they had made an allusion to such an idea. You have to write an EIS on an action which has no significant adverse environmental impacts, but arguably significant favorable environmental impacts. My goodness, they said that loud and clear on July 13.

Now, let me draw just a few conclusions from this remarkable experience we had in the "Tenn-Tom" litigation. We were all rather surprised that the core was decided on the need for a supplemental EIS for the project. First, it provides evidence, if I may say so, that under NEPA, to a considerable degree, an agency's compliance with NEPA lies largely in the eye of the beholder. In part, the outcome depends frequently on which federal judge is evaluating the evidence. Judge Keady was the one judge in this country most familiar with the project. All of its impacts, he held, were in complete compliance with NEPA. Judge Revely, a newly appointed judge to the 5th Circuit Court, held that we were very much in non-compliance. That is what leads, in part, no doubt, to defensive EIS writing. Practically any federal action can be characterized by some federal judge or other (and always will be characterized by opponents of that project) as a major federal action significantly affecting the quality of the human environment, requiring a full scale EIS.

Two, the rule of law which has been handed down now by the 5th Circuit Court regarding beneficial impacts is, in my view, an unwise rule of law. To whatever extent the CEQ, by regulation, can make clear that agencies do not have to write EIS's on activities which have no significant adverse impact, but arguably significant favorable impacts, I think it would be a very good thing to do. Perhaps the other federal circuits will show deference to the CEQ. Perhaps the Supreme Court will resolve the question and we won't have to have so many unnecessary EIS's written, especially unnecessary supplemental EIS's written, unless you find that actually there is some significant adverse environmental impact.

Three, it seems to me that we may see before us now, though we may be overreacting, a spectre of a new wave of NEPA lawsuits demanding that supplemental environmental impact statements be written for practically any large scale project, because most big projects this country undertakes, either in the private sector or the public sector, take well over one year to design and build. The "Tenn-Tom" will take well over ten years (more like sixteen years according to present plans) to design and build. There are always new design changes. Many design changes are adopted between the original rudimentary planning and the final design. There are always vast amounts of new information coming in, the better the agency or the private company does its job under NEPA, improving the design to enhance environmental quality and generating new information so that we know about every environmental impact and every alternative. As we head down the pike, the greater is the chance that a plaintiff group which simply wants to kill the project will be able to get an injunction to stop the project for failure to comply with this rule of NEPA expressed in the July 13, "Tenn-Tom" decision.

I point out another practical and very obvious danger. Once the final environmental impact statement is filed under this rule, especially once that final EIS has been held to be adequate by one or more federal courts, we now have a rather strong disincentive for the federal agency or the private company or whatever to adopt any significant changes in design, no matter how beneficial they may be from an economic, environmental, efficiency, safety viewpoint, etc. That would mean that if you adopt these changes in design, or if you generate lots of new environmental information, then you may be legally required to do a supplemental EIS. In turn, that is likely to generate a new lawsuit. If you do not file a supplemental EIS, there can be a lawsuit to make you file one even on purely beneficial impacts. If you do file a supplemental EIS, there can be a lawsuit on the adequacy of that supplemental EIS. So we have a disincentive to generate valuable environmental information and to adopt valuable design changes in projects.

Now, I see that because we were so remarkably ahead of schedule this morning, I can either go on and talk about other vital issues or I can let you get to lunch. I don't know how to take a show of hands on something like this so I'll compromise and mention very quickly a few other things, and then let you all go to lunch.

First, the question of alternatives - I believe that the CEQ/NEPA regulations can be made more explicit and finely drawn on the question of what alternatives really have to be discussed. Consider the dilemma of a permit applicant who wants to build any sort of industrial facility. For example, he may have one piece of property, he may have options on two pieces of property, but they are his two sites. Yet, when the Corps of Engineers sometimes has had to write an EIS on an oil refinery case, people have insisted that we study dozens of possible sites for that oil refinery. The applicant says, "Yes, but I'm not interested in all of those refineries and sites in Alaska. I want to build one down here in South Carolina or somewhere." "No, we have to look at the sites in Alaska." At least that's what some environmentalists say.

We obviously follow the rule of reason, but even our rule of reason requires that, sometimes, a great number of sites be studied. We have tried to address that question in our own Corps of Engineers NEPA regulations. I am not entirely sure the CEQ/NEPA regulations would support us on that point if and when we end up in a good lawsuit.

In my view, the emergency provisions in the current CEQ/NEPA regulations are really not adequate. They suggest that there should be prior consultation during or before the emergency with CEQ over alternative arrangements. I can assure you that the Corps of Engineers is sometimes in the business of emergencies. I mean, when we are fighting a major flood on some dark and stormy night in Louisiana and you are about to lose half the state of Louisiana and all the people and buildings therein, the District Engineer rarely has the stomach to make a phone call to try and find somebody from CEQ at home to make alternative NEPA arrangements. So when you read what we said on that point in our NEPA regulations you can see that it is really different, to say the least, from what the CEQ/NEPA regulations seem to say. We hope that that also will be sustained if ever challenged in court, probably after the fact.

Finally, I want to say one quick word about the referral process because, in my view, the referral process can be misused. There can be political game-playing in the federal government with the referral process. After an agency has fully planned a project and fully coordinated with every interested federal agency, and all the other agencies have had a chance to put in their comments and get their licks, so to speak, at this activity, I question whether it is desirable then - when this question is being given to Congress and has been given to Congress for authorization purposes and appropriation purposes - if it is reasonable to disrupt the relationship between the agency and the Congress by extensive periods of referral, where one agency wants to refer this project at the last minute, superceding the effort of the lead agency to refer the matter to the real decision-maker which should be, and must be, the Congress. I realize that referral does have some ligitimate use, but I feel that we have to fine-tune that provision as well, because under the way it is written now it can be misused. I think we can improve on that.

All right, I realize that we are supposed to be subjected to questions, but I do have the great advantage in that every moment you delay in questioning and cross-examining me is one less minute you have to enjoy your lunch, so I am going to conclude. If anyone has any questions I will be more than happy to address them.

WORKSHOPS

EIS REVIEW WORKSHOP

Panel Members: Dr. Gerald Miller
Ms. Clara DeLay
Mr. Ted Bisterfeld

After an initial explanation of the EPA's rating system (see appendix) and an assessment of the direction the review process is envisioned to take under the present Administration, the discussion was directed into the following issues submitted by the attendees. Because the CEQ Regulations are so central to the review process, whenever possible, these questions were referenced to the appropriate Section of that document.

Section 1500.2(c) - Policy

> Integrate the requirements of NEPA...so that all such procedures run concurrently rather than consecutively.

Under the 1977 Amendments to the Clean Water Act, the Corps of Engineers analyzes the Section 404 (deposition of dredge and/or fill material) impacts in certain of its EIS's rather than in a public notice immediately prior to facility construction. Since Region IV has generally found this procedure to have merit, it was suggested that other developmental agencies consider doing likewise. This initiative fostered a great deal of comment -- both positive and negative. Legitimate reasons were offered by representatives from State DOT's and SCS as to why this is difficult to accomplish; however, it was also acknowledged that a "worst case" scenerio for the various alternatives could be developed which would highlight areas of significant disagreements. Presumably, efforts could then be made to either mitigate the adverse impacts or reach a compromise on the selected alternative.

Section 1500.5(b) Reducing Delay

Interagency cooperation before the circulation of a draft EIS has proven to be an excellent technique to avoid adversary comments/delays on a completed document. The question was posed as to how will this continue to be done in the face of restraints on travel? The suggestion was made to send a preliminary proposal to prospective attendees/involved agencies to be followed up by a synopsis of the actual scoping meeting for subsequent comment. Since formulation of at least a generalized plan is required for any project, it was not felt that any unnecessary/duplicative efforts would result from using this approach. Regardless of reduced travel funds, EPA Region IV hopes to maintain its scoping commitments through more careful scheduling and use of less costly methods of travel.

Section 1501.5 Lead Agency

Some interesting examples were discussed of controversy/problems associated with which Agency would or would not serve in the capacity of lead agency. Ironically, there were examples offered of the same agency having strong opinions both pro and con over what appeared to be very similar types of projects. While all the details involved in an agency's decision-making were certainly not available to outsiders, the lead agency concept is apparently often not as simple/clearcut as might be imagined. From a perspective of overall environmental protection, it was repeatedly mentioned that some formalized program needs to be developed to solve this dilemma. While a great many specific examples were offered, no unifying principles were developed due to the short time frame.

Section 1501.6 Cooperating Agencies

This concept had immediate appeal to most of the attendees since it uses the broad expertise of the federal community to such good effect. Numerous examples were discussed where cooperation had yielded a product far superior to that obtainable from just one agency. However, it was also noted that with the present and forthcoming budget cuts, continued implementation of this procedure will become increasingly difficult.

Section 1502.1 Purpose

As an initial premise, it was stated that an EIS is a tool to assist in making better decisions, not just a pro forma document to legitimize a previously made decision. While no one seriously argued the contrary position, many comments revealed instances where certain of the attendees felt this was in fact the case. This was an area which generated strong and divergent views among the participants. However, since subjectivity plays such an important role in this regard, there was more heat than light shed on the topic.

Section 1502.14 Alternatives

The question was asked, "How does EPA react to the absence of any reasonable alternatives to a proposal"? That is, in those EIS's where an objective is substituted for different options. This question was appropriate since the tact of preemptorily eliminating all options which do not meet a predetermined objective was opined as becoming more prevalent. Since the alternatives section is the heart of the EIS, decisions should not be made which will prejudice the final selection. However, if the entire process is structured to achieve an objective, i.e., to nourish a beach in front of existing housing or increase the carrying capacity of a stream along a given reach, then the entire spirit of the NEPA process is compromised. While everyone acknowledged that alternatives were necessary, certain of the participants indicated that they were familiar with EIS's where uneconomic, unfeasible, etc., options were culled prior to draft preparation. Hence, the lack of alternatives may be more apparent than real. As would be expected, EPA has guidelines for review of all types of projects but handles each EIS on a case by case basis.

Section 1502.23 Cost Benefit Analysis

How development agencies spend their money legitimately is the business of that particular agency; however, the EIS should be expected to demonstrate that the environmental losses are balanced by compelling economic and/or societal gains. This was generally thought to already be the case. Nevertheless, it was mentioned that post construction studies to verify these gains would be worthwhile. Some individuals also expressed concern over agencies' guidelines which require a project to generate maximum economic benefits. While this has immediate appeal, it obviates smaller, less environmentally damaging alternatives for more elegant projects with accompanying larger environmental perturbations.

Section 1504.3 Procedure for Referrals and Response of Unsatisfactory EIS's to the Council on Environmental Quality

Agency representatives were very interested in the limitations associated with EIS referral. This was probably fostered by the fact that the only example of a successful referral within EPA, Region IV, did not actually result in stopping project implementation.

Section 1508.7 Cumulative/Secondary Impacts

The tendency of Federal agencies to focus solely on a particular project to the exclusion of all other activities in the same geographic area was discussed. Some examples offered during the workshop were the multiplicity of construction within the boundary of the Biscayne Aquifer and South Florida Water Conservation Areas. In general, it was agreed that actions which, if taken in isolation may not be significant, can be catastrophic when linked to other similar/different activities. It was also acknowledged that it is difficult to definitively ascertain exactly when too much of something has occurred.

Section 1508.8 Effects

> In a related matter, the difficulties of assessing secondary impacts to the satisfaction of all parties was entertained. Although this topic elicited a great deal of discussion, other than a common sense approach, no concensus was reached. Similar discussions were held regarding the lack of depth in some states' coastal zone consistency.

Miscellaneous Discussions

The federal role in land use understandably generated a great deal of comment, especially considering the recent initiatives by the Reagan Administration. While there was wide divergence of opinion as to whether there was a legitimate federal role in land use, it was acknowledged that the present federal statutes and programs do, in fact, direct land use in certain areas. As a result of specifics enumerated during the discussions, there was a degree of amazement among certain of the attendees that the federal establishment had such a pervasive inffuence on land use.

APPENDIX

The EPA, under authority of Sub-Section 309 of the Clean Air Act, is charged with the responsibility of reviewing and commenting in writing on proposed actions of Federal agencies referred to the EPA and related Environmental Impact Statements prepared pursuant to the requirements of the National Enviromental Policy Act.

Under the CEQ guidelines, EPA is mandated to respond to draft EIS's within 45 days of the published date of receipt unless the originating agency establishes a longer deadline or we request, and are granted, a 2-week extension.

EPA's review of the draft EIS addresses both the environmental impact of the proposed action and the adequacy of the information presented in the DEIS. Subsequently, our comments are then designated by 2 notations: Categories LO, ER, OR EU, which signify an evaluation of the environmental impact of the proposed action; and categories 1, 2, or 3, which signify an evaluation of the adequacy of the document.

- LO (Lack of Objections) - EPA anticipates no significant, long-term objections to the proposed action as described in the draft EIS, or suggest only minor changes in the proposed action.

- ER (Environmental Reservations) - EPA has some significant reservations concerning the environmental effects of certain aspects of the proposed action. EPA believes that further study of suggested alternatives or modifications is required.

- EU (Environmental Unsatisfactory) - EPA believes that the proposed action is unsatisfactory because of its potentially harmful effects on the environment. Furthermore, EPA believes that the potential safeguards which might be utilized may not adequately project the environment from hazards arising from this action. EPA recommends that alternatives to the action be analyzed further (including the possibility of no action at all).

THE NUMERIC RATING OF:

1 - (ADEQUATE) - The draft EIS adequately sets forth the environmental impact of the proposed action as well as alternatives reasonably available to the project or action.

2 - (INSUFFICIENT INFORMATION) - EPA believes that the draft EIS does not contain sufficient information to assess fully the

environmental impact of the proposed action. However, from the information submitted, EPA is able to make a preliminary determination of the impact on the environment. EPA has requested that the originator provide the information that was not included in the Draft EIS.

3 - (INADEQUATE) - EPA believes that the Draft EIS does not adequately assess the environmental impact of the proposed project or action, or that the statement inadequately analyzes reasonably available alternatives. EPA has requested more information and analysis concerning the potential environmental hazards and has asked that substantial revision be made to the draft EIS.

All final EIS's resulting from DEIS's not rated LO-1 are reviewed to determine whether the statement substantially resolves the problems surfaced by the Draft EIS.

In most instances, substantive changes are made in the final to reflect our comments. In cases where we had serious concerns and/or found the project to be environmentally unsatisfactory in the draft stage and the final has not made any concessions, we attempt to work the problems out with the agency prior to proceeding with a referral.

NEPA AND THE PLANNING PROCESS

Panel Members: Dr. Cliff Bragdon
Mr. Bob Cooper
Mr. Joe McEnerney

After an introduction of the panel members, Dr. Bragdon summarized three parts of CEQ implementing regulations that emphasized planning. These are:

Section 1501.2 Incorporate NEPA into Agency Planning

> This section emphasizes the need to incorporate environmental planning into the agency's normal planning requirement. It has been EPA's experience that if environmental planning for a project is started concurrently with other project planning, a considerable time saving can be realized in project implementation.

Section 1502(c) Indirect and Direct Impacts

> This section discusses the need for considering both direct

and indirect project impacts during the NEPA process. This is seldom done because the indirect impacts are usually out of the agency's control.

Section 1506.2 Reducing Duplication

> This section suggests using the NEPA process as a vehicle for addressing project inconsistency with State and local land use plans. It also suggests using the environmental document by State and local agencies in their permit decisions. EPA's experience suggests that this can be quite valuable.

Following a general discussion of the above, the other panel members presented a summary of problems they encounter in working with the NEPA process.

Bob Cooper discussed an EPA construction grants project for which he had been project manager. The EIS discussed sewerage treatment strategies in South Florida. In this Draft EIS, EPA, - Region IV recommended the "no action" alternative for seweraging the area. It was felt that if the area was seweraged, it would be immediately opened-up for secondary development.

Joe McEnerney commented on three areas of concern to the EIS Review Branch. These were:

1. The use of common planning assumptions for different agencies' EIS's in the same geographic area;

2. Reluctance of agencies to address the secondary impacts of the project; and

3. Early coordination of projects with regulatory agencies.

Using the above as discussion topics, the workshop was opened for questions and responses from the participants.

STREAMLINING THE EIS PROCESS

Panel Members: Ms. Nancy Nord
Mr. Robert Howard

COUNCIL ON ENVIRONMENTAL QUALITY

Agency Implementation of CEQ's NEPA Regulations

August 6, 1981.

AGENCY: Council on Environmental Quality, Executive Office of the President.

ACTION: Request for public comments.

SUMMARY: This notice requests public comments on Federal agency implementation of CEQ's NEPA regulations (40 CFR Part 1500 *et seq.)*.

ADDRESS: Comments should be addressed to General Counsel, Council on Environmental Quality, 722 Jackson Place, N.W., Washington, D.C. 20006; Attention: NEPA Regulations Oversight.

DATE: Comments should be received on or before October 13, 1981.

FOR FURTHER INFORMATION CONTACT: Nancy Nord, General Counsel, Council on Environmental Quality, 722 Jackson Place, N.W.; (202) 395–5750.

SUPPLEMENTAL INFORMATION: Since the creation of the Council on Environmental Quality in 1970 by the National Environmental Policy Act (NEPA), CEQ has been responsible for overseeing federal efforts to comply with NEPA. In 1970, the Council issued Guidelines for the preparation of environmental impact statements. In 1973 the Guidelines were revised to take into account the first three years of experience. However, many problems still existed, and CEQ conducted a broad investigation resulting in a 1976 report called "Environmental Impact Statements: An Analysis of Six Years' Experience by Seventy Federal Agencies." In 1977 CEQ began a new rulemaking process, including public hearings and extensive consultations with all interested organizations, especially the business community, state and local governments, and environmental groups. Final regulations were issued on November 29, 1978, and became effective and binding upon most federal agencies July 30, 1979, and for all remaining agencies on November 30, 1979.

Under the NEPA regulations each federal agency must adopt implementing procedures after consultation with CEQ (see 40 CFR 1507.3). The Council published its Tenth Progress Report on Agency Implementing Procedures on May 7, 1981.

Additional guidance, as provided by 40 CFR 1506.7, on the NEPA process was published by CEQ on general policy and procedures (Memorandum, Forty Most Asked Questions: March 23, 1981; 46 FR 18026–18038); and on the scoping process (Memorandum: April 30, 1981).

The Council's regulations and agency procedures issued pursuant thereto were designed to make the NEPA process more useful to decisionmakers and the public, reduce paperwork and delay, and establish procedures for referrals in case of interagency conflicts. As part of the Council's NEPA oversight responsibilities, and to further the goals of Executive Order 12291, we are interested in the public's views on how NEPA procedures issued by the various agencies have fostered implementation of NEPA. The Council wishes to solicit comments on the following questions:

1. Is the scoping process a useful procedure for identifying controversial issues?
2. Is the scoping process used at an appropriate stage in the development of agency proposals?
3. Is tiering being used to minimize repetition in environmental assessments and in environmental impact statements?
4. Havecategorical exclusions been adequately identified and defined?
5. Are environmental impact statements emphasizing analysis or description?
6. Are environmental documents being integrated with any other analyses required prior to taking action?
7. To what extent has duplication with state and local procedures been reduced, especially in states with legal requirements similar to NEPA?
8. Are there suggestions for reducing costs in preparation of environmental impact statements?
9. Are there suggestions for eliminating delays in the preparation of environmental impact statements?
10. To what extent, if any, have agencies required an applicant to submit information in excess of that needed to make a decision on an application?
11. What day-to-day agency practices could be improved to assure better compliance with NEPA?

By soliciting comments the Council wishes to identify possible methods by which the goals of NEPA can be more precisely and expeditiously accomplished. All suggestions and comments will be carefully considered. Commenters are requested to be as specific as possible when commenting: it is preferable that particular cases or examples be cited. Limited resources do not allow us to investigate each case, but we can contact the agencies involved to secure their general compliance with NEPA and the regulations. The Council would appreciate receiving any responses on or before October 13, 1981.

Note.—Attached is a related memorandum for Federal agency NEPA liaisons.

Nancy Nord,

General Counsel.

Memorandum for Federal Agency NEPA Liaisons—Revisions to Agency NEPA Procedures

August 6, 1981.

Since the issuance in 1979 of the Council's regulations implementing the National Environmental Policy Act (40 CFR 1500 *et seq.*), almost all agencies of the federal government have issued their own procedures, as required by § 1507.3 of the regulations. Some agencies are now reviewing their existing procedures to accommodate new programs and to assure ~~that they~~ are benefiting from their recent experiences under the regulations. For example, agencies that were hesitant to use categorical exclusions, tiering, or other provisions in the regulations are now taking a second look at those provisions. The Council encourages such evaluations. We will be working with agencies to improve their efforts to use environmental documents to achieve the goals of the regulations: to make better decisions, and to reduce paperwork and delay.

Section 1507.3 ("Agency Procedures") states that "The procedures shall be adopted only after an opportunity for public review and after review by the Council for conformity with the Act and these regulations * * * Agencies shall continue to review their policies and procedures and in consultation with the Council to revise them as necessary to ensure full compliance with the purposes and provisions of the Act."

Agencies considering revisions to their NEPA procedures are requested to consult the Council during the early stages of their review so that CEQ can advise them on the regulations and on the practices of other agencies. Agencies should make a special effort to consult other agencies with similar programs to coordinate their procedures, especially for programs requesting similar information from applicants.

The cover letter transmitting proposed revisions should identify and explain any important or controversial changes. Proposed revisions should be transmitted to the Council prior to publication in the Federal Register and should be addressed to the CEQ General Counsel.

After Federal Register publication and completion of the public review period, the agency should send us the proposed final version, including the preamble with responses to comments, on a marked-up copy of the Federal Register version. The Council will review the proposed final procedures as expeditiously as possible and in no event will this review take longer than 30 days.

Thank you for your cooperation.

Nancy Nord,

General Counsel.

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Nancy

What I'd like to do is take a somewhat different approach from the other workshops. As I indicated during my presentation this morning, the professional staff at CEQ is new as of May of this year. What I would like to do is use our request for public comments recently published in the Federal Register as an agenda for this workshop. I would especially like to hear your perceptions of problem areas in the CEQ regulations and the problems your agencies have had in implementing the CEQ regulations. Any suggestions you have for changes I would welcome, especially those suggestions for ideas that streamline the process. So with that and emphasizing that I want this to be a very informal session, I'd like to initiate a discussion of scoping. I would be very, very interested in not only the good experiences you all have had with scoping, but if there are bad experiences, I'd like to hear about those too so that we can start thinking about how we can make the process work a little better than it has in the past. Is there a general consensus that the scoping procedure is a useful procedure for identifying problems early or is it being used as the first step to start talking about the merits of a proposal? Does anyone have any observations on that?

Participant

I think it's a good starting point but it can't be just one meeting. There has to be extensive follow-up. Often times the public will wait until the EIS is published to make a comment on it even though we had documented all along the way so there has to be more than just a meeting. There has to be phone follow-up and also letter follow-up and then setting up another meeting to reach the people you didn't reach the first time.

Nancy

How do you identify the people you need to reach?

Participant

Usually you know the Federal agencies, the State agencies, the county and the city agencies and then you'll have your private interest groups and also a notice is placed in the newspaper.

Nancy

To what extent have any of you experienced problems getting other federal agencies to actively participate in the scoping process?

Participant

Travel funds. That's the difficult thing.

Nancy

Is that the basic problem? Just getting people to meetings? Recently several agency people recounted to me an experience with two agencies, one of which was acting as the lead and the other one as the cooperating agency. The second agency was not inclined to travel 50 miles to attend a scoping meeting and that ended up adding months of delay to the process. Now 50 miles is not a question of travel funds. That's quite a different question.

Participant

Too often scoping has been considered to be a meeting. First of all scoping should be an effort ... whatever contacts are necessary with those agencies, groups, and individuals who might have some input. I think it's very important for the agencies to make a determination on their own of the merits of the project and also to determine what the significant issues are. And that must be a best faith effort on the part of the agency to make that determination. I would like to see it done in such a way that there is a summary that they have made that would be available to all people who will be involved in the scoping. Now there will be preliminary meetings and then that should be -- there should be some point where you're ready to publish your findings as an agency. Publish may not be the right word but to release those findings and say this is what we have found in our agency. That's maybe the point where a meeting has to be held. I don't hold that a meeting is of tantamount importance but that there should be a point where you have contacted the people and they have been able to respond to you so that you cut off for once and for all those things that are of no significance. You know you can look at EISs and you still see the volumes and volumes and the pages and pages of items in very much detail that would never be discussed in a FONSI for instance. Under other circumstances they are considered to be of less significance and why not let them lie as that and deal with the two, three, four or five items of significance in the EIS. The culmination of the scoping process should be that virtually all people who are involved agree on this with the final decision being with the agency that develops the document.

Nancy

Certainly the CEQ regulations don't require that an actual meeting take place. The regulations talk in terms of a scoping process. I have noticed that several of the agencies' regulations do require an actual meeting. What other techniques are there for scoping in addition to having meetings?

Participant

I think scoping is a very misunderstood concept. At least in my dealings with it. We typically will have a scoping meeting. But very often I find that the scoping meeting itself is not really the most productive part of the scoping that we get accomplished. Very often the most productive part is when you reach for those people who have special expertise in areas and discuss the project with them and try to scope out what you should be addressing -- what are likely to be the things that come up with people who have technical backgrounds in it rather than in a public forum. That is very often very helpful and probably the most important part of scoping. However, in a recent project that we were involved in where we had a public scoping meeting, and we always do, the reverse was true. In fact, in that scoping meeting we got a significant number of comments that we really didn't know were going to be coming from the public. We didn't know that they were very concerned regarding certain kinds of alternatives that hadn't been previously looked at. And it was very, very helpful. I guess what I want to say is my impression is so much like every part of the EIS you have got to kind of design the scoping process to what it is you are dealing with. And it's not only a single public meeting. At least in our experience it isn't. There is a perception on the part of applicants and federal agencies that the scoping process is a meeting. And that really isn't always true.

Participant

One thing I've observed from industry's viewpoint is that there are some agencies who seem to take the scoping process as sort of a way of getting feedback not only from other cooperating agencies but from the public on what they feel are the issues. They identify the important issues almost in a democratic sense of how many people are for this being an important issue -- they count it up and then through a public referendum decide the issues. When you look at the project from a purely technical/scientific standpoint and forget the emotion surrounding the projects you often find that some of the things that they hone in on, while they might be politically controversial or something of that sort, are not necesarily the significant issues affecting the natural environment.

Nancy

At what point does the scoping process begin?

Participant

As presently stated, the scoping process occurs after the decision has initially been made to prepare an EIS. We like to get involved earlier than that to see if there is indeed a real concern for the EIS being prepared. When we talk about streamlining the EIS process maybe that's where the streamlining is, to get together before you prepare the EIS and really streamline the process.

Nancy

Well, that leads me to another question dealing with the situation in which you have an applicant coming to an agency and the boundaries of the project are pretty much drawn out. To what extent is it practical or how far do the agencies feel they go in identifying alternatives. Do you feel bound by the terms of the project as presented by the applicant so that the decision is really a "go" or "no go" one, or do you look at a wide range of alternatives beyond those practical for the applicant? And is there a way to integrate the scoping process into the applicant's planning procedures?

Participant

I am from the Nuclear Regulatory Commission. Our problem is that we are in a position of interacting with the private or public utility after they have done all of their work, made all of their decisions, have built up a termendous argument for their goal and we are often times called into an areana that's far beyond our area of expertise in terms of looking at alternatives. How far do we carry alternative sites for example? It's a difficult problem and I think that our real problem lies with the fact that there's no way that I have seen yet to encourage the utilities at an early stage in their own planning process to involve the public. Quite often the public doesn't know anything about these projects until we get into the act. We have a very formal process and we manage to get everybode notified after we hear about it but that's very late in the process and the alternatives that are available are extremely limited. I see a need for permitting agencies to get the private initiating groups to inform the public early. We're limited in our ability to do that.

Participant

This is true I think for most of the permitting agencies. There is a big difference between a permitting EIS and an EIS which is by an agency sponsoring a project. And the role of alternatives I think is somewhat different and, yet, in recent scoping metings that I have chaired, alternatives are still one area that the public and certain other bodies are very interested in bringing up and asking the federal agency to address. I think it's -- the key point that I keep coming back to is, you know the utility, say, is there, and the public service commission is there, and what role then does the federal agency really play other than disclosure? You have a fine disclosure of the various alternatives and your analysis of them and the preferred -- environmentally preferred alternatives but usually the decisions are made. Public service commissions have made their decision, the utilities made their decision and it's of interest to me particularly as to what role then are we playing.

Participant

I'm not an applicant but I work with industry. I'm Mike Hartman for the record. I'd like to make a follow-on suggestion based on the problem that has been outlined. It is true that industry gets involved in their planning and making decisions based on their planning in an earlier process than the NEPA process. The NEPA process as far as industry is concerned is after the fact. Now it's the chance that government has to sort of second guess industry decisions. Now the thing that needs to be done I think is bring these two decision making processes more in line from a timing standpoint because naturally industry has made a decision, if they have spent millions in purchasing sites and doing engineering studies and then go into government with an application involving NEPA and the guy says now wait a minute, you can see the defensive posture that industry is going to be in. Ok? Now if we had a scoping process that worked or could work particularly honing in on alternatives even more critical than impacts almost -- and I'm talking about basic alternatives like: Do you really need this facility? Have you really sited it right? And have that very, very early before an application is submitted. And make it become definitive in terms of, look, these are the alternatives that we're going to examine and government has agreed that these are the alternatives and they're not going to three years later when they're going through a NEPA process bring up another one, unless they have a very, very good reason - unless something is of obviously great public significance. Another problem is that certain questions are going to have to be ruled on by some other agency and it may be a state agency as in the case of a power plant, looking at the question of the need for power, for example, where very often state utility commissions have jurisdiction to decide that issue. And they have set up the staff, they have their own testimony and they go though an awful lot of stuff to certify the need for power. What I don't understand is why the NEPA doesn't rely on that decision basically but imposes this responsibility to overview everything and in overviewing it sometimes government officials want to come up with another second way of looking at the question and that can cause problems. I wish they would have early scoping meetings, look at the analysis done by the applicant and other agencies, and determine that they are going to mainly rely on his judgment ultimately because he's got the expertise and we'll not necessarily second guess them although perhaps if they had very good reasons they could do that.

Nancy

Well, you've raised two points. With respect to your first point I am curious as to what the attitude of the agency would be if an applicant came in and said we'd like your help in scoping his project because at some point perhaps two years from now we are going to be filing an application for a permit. But in our initial planning stages we would welcome your help in helping us scope the project. Is this something that the NRC for example is doing?

Participant

Well, yes as a matter of fact we do it. We have regulations which we define as "early site review" opportunities for the utility and it's put in there purely to encourage the industry to come in to resolve these big issues of are you putting it at the right site. It's primarly ... We have only had one indication of interest in that and we get very poor responses. We would certainly like them. That's why the regulation was developed.

Participant

There's one big concern about this whole area and it has to do with the timing of the evaluation of alternatives versus the timing of the publication of your documentation of that evaluation of alternatives and I think that herein may be a lot of the problem that you have a lot of site specific concerns that you must deal with after you have gone ahead and made some other basic decisions and that takes a great deal of time. There's a lot of investigations on site, there's a lot of mitigation work that has to be done, working out the applications, etc., and so there's a rather substantial time frame between some fundamental decision making on alternatives to the point that there's a documentation and a disclosure of that by the federal agency. I think that sometimes things change in that time frame and you may even have scoping or you may have major issues come up which then are alternatives and it causes not only the applicant a great deal of difficulty trying to deal with those when there is really no reasonable expectation that you're going to be able to change your decision, easily at least. So it is a difficult problem.

Nancy

The regulations, the Act and a number of court cases indicate that an agency need only look at reasonable alternatives. Is this sufficient guidance?

Participant

I think that there is a responsibility upon the agency as to determination of what is reasonable and guess subsequently what the courts will say. It's a difficult work to define but clearly in this case I think there's good argument that there may not be another situation that's reasonable. We've certainly come across that ourselves in our construction grants wastewater projects where you're talking about upgrading a very large existing facility. It is really not reasonable in some cases to consider building a whole new plant somewhere else. If a decision to proceed with a project was evaluated in the context of what other sites were reasonably available and we found two other sites that were basically reasonably alternatives and agreed that if you had to go to one of those other sites, you would probably not have this particular industrial participant. But you'd at least get an opportunity to evaluate what the nature of this particular proposed site was in comparison to what other sites were available to build the plant.

Participant

You know, when I was first in this business several years ago there was a concern that was expressed by applicants that they basically wanted to go ahead and line up the property and not have the costs of the property escalate and get options and everything before the project would be disclosed through the NEPA process and the evaluation of alternatives. Since that time I have heard from applicants and their consultants that that's no longer such a great concern. It's more of a concern that if you may get massive delays in your project and the resulting escalation of costs, in fact it's better for you to disclose it early on even if you don't own it those costs are insignificant compared to some of the other costs. I think industry at least in my experience and may be somebody here from industry would prefer to talk about this but they would not have a problem with you dealing with alternatives with them and even making your preference known on alternatives when they're having to deal with alternatives. But sequential decision making makes nobody look good. You're just asking for problems. And I tend to agree I think and hopefully others too that it's much, much better if you can have the decision making to be made, the alternative evaluation.

Participant

There is a model for that in, I don't know if there's anybody here from the Rural Electrification Administration, but their implementation guidelines do have this type of procedure, whereby you look initially at siting and you publish a siting study which is passed on by the agency before you go on. At the same time you look at major alternatives to the project. And that is also passed on before you go into an EIS process. So by way reference.

Participant

I'd like to really just ask the question for the regulatory agencies of private industry if in fact you have any control over anything other than the "no action" alternative. Is there anything else you can look at? If the industry comes in and says, this is what we want to do and this is where we want to put it, is anything else but a strawman or a strawperson?

Participant

Other than the regulations that we're dealing with, it causes the federal agencies to disclose not only alternatives to the federal agencies but also alternatives to the applicants and to others and it's certainly a good point. I think it's a point that we're all making here -- the role that the federal agencies play through NEPA in the evaluation and disclosure of information on alternatives. I would prefer to see my role be one of assisting applicants make good decisions. Make decisions that are environmentally sound decisions. So that they have a reaction from the federal agency prior to their having to go on line and go public with the decision. That would be my preference. There are some things in the way or procedures now which are hindering or hampering that from occurring.

Participant

Nancy, you were talking about putting some bounds on alternatives - reasonable alternatives. It was pointed out as to what the obligation of agencies and other people are in this thing. I think we have to realize that when you look at alternatives you ought to look at alternatives that are mainly environmentally, clearly environmentally superior alternatives. And use that as some kind of a yardstick and forget about other alternatives that might be economic in nature or some other. We shouldn't use NEPA and alternative evaluation to make sure that industry makes perfect decisions. We never make perfect decisions. It may be that industry sites things based on politics for that decision to site that facility brings up such terrible environmental consequences to it and there is clearly another situation over here that you should have looked at.

Nancy

Isn't that what NEPA's all about? I mean do we have to say that again?

Participant

No. But I think some people use NEPA as an excuse that perfect decisions are made.

Nancy

The purpose of NEPA is to make sure that informed decisions are made. On another point, the CEQ regulations clearly allow one federal agency to adopt the EIS of another federal agency. They are silent on the question of the relationship between a federal agency and the state agency if the state is producing an environmental impact statement-like document. This is a problem that I'm aware of and I'd like to clarify that. What do you think?

Participant

I'll give one example of this situation. That has to do with the State of Florida. The State of Florida has site certification process for utility industry and it has a DRI process for other kinds of activities and these processes are different than the NEPA process although they contain major pieces of the NEPA process. And what EPA has done and what I would encourage other federal agencies to do is as well is to work with the states to use the state process as much as you can. We have an agreement to combine the State site certification process with the EIS process. And it's working very well. The major difference in the two processes is in the evaluation of alternatives. The state role is one basically of certifying a proposed site and making it an environmentally compatable site rather than a full evaluation of reasonable alternativs. So, we have basically divided the workload between the agency looking at the alternatives and the state addressing the site specifics with our overview looking at it, working with them.

Participant

I'm with the Department of Transportation, like I said and I notice our problems are different from other agency problems but the compliance document rather than a problem solving document. And on top of that people that review the document are so often so far removed from the project that they don't understand the key issues involved and the questions and suggestions that they make sometimes are unrealistic. People in Washington, how are they going to know about this little certification program where the local agency person makes a certification and he goes on record saying I don't find anything environmentally wrong with this project.

Nancy

I would encourage agencies to do that. The closer that the decision maker gets to the site of the project, the better, and more well informed decisions he is going to make. On a different point, do any of the agencies here after preparation of the EIS and construction of the project go back and review the mitigation promises that were made in the EIS to take look at what is ... and if so, what have you found?

Participant

I work for the Corps of Engineers. But the Corps and I don't know what time frame I'm talking about but it's been within the last couple of years -- out of initially one hundred and twenty to look at, they found that all but 48 had adequate post construction data. And out of those 48 they further cut it more to what they could make sense out of. They came up with twenty that had reasonable data. Those reports are coming out now. So yes, someone is looking at it in the Corps. And I'm assuming that there will be a summary document of how good the techniques for estimating mitigation and how good it's working. There's also been some other work on estimating mitigation for EIS preparation.

Participant

How do you estimate mitigation for a project?

Participant

Oh there's all kinds of methods. In the Lower Mississippi Division we have our own mitigation method. It's called the habitat evaluation system. The F&WS uses the habitat evaluation procedures. We use modifications of both.

Participant

Is this an area where there might also be a difference between regulatory and authorized projects. Where there might be a federal project versus a regulatory EIS?

Participant

It depends on the project. We can go through the same procedures for a permit process as we would go through for our own. It just depends on the size of the project and the area impacted. We've required mitigation on permits.

Participant

From EPA's standpoint on this question of mitigation to the extent that there is a requirement somewhere else for a follow-up, because of resources, typically there hasn't been a major emphasis on the part of the agency to go back and check on things.

Participant

Ready made mitigation follow-up.

Participant

That's right. Again it depends on the project.

Participant

One of the points in another session was that in regulatory environmental review the mitigation requirements were translated into the permit because that was enforceable whereas the NEPA mitigation was not enforceable and I was ... because we have that feeling that now under the regulations if we put mitigation requirements in our EIS it's certainly more enforceable. It's something that if we say we're going to do, we must. That's our position.

Participant

Well, we become visible. My understanding of this section is that we're supposed to discuss the mitigation and the program that we're going to use to monitor it. So, supposedly we're creating a process or procedure that we describe in the document. It's public knowledge and questions can be raised if we don't have our act together.

Participant

Probably mitigation is the most difficult when you have a party which is actually doing the work who is different from the party who did the EIS, i.e., another responsibility center. It gets much more difficult in that case. If you're a permitter for an applicant or with the Highway Department where you have state, locals and others involved in making sure that all along the line people understand what it is they're supposed to be doing. I don't think it's necessarily a conscious decision not to be mitigation. It's just whether or not the responsibility has been effectively communicated.

Participant

Well, in the permit case, for instance, you make that a condition of the permit. You will do this? And it depends on who writes the permit. It depends on how astute the permitter is and the permittee is.

Participant

Well, if, the applicant doesn't communicate that to the persons out there building it or whoever is operating it and if the agency doesn't ever go out and look.

Participant

Of course, you begin to run into other problems. I can't tell you of the volume of permits for instance in our division, but I can guarantee you it's in the hundreds and you have a staff of probably 16 maximum in the whole division that would be handling these permits. And it's physically impossible to check on a permittee unless it's a hot case or a big case. You don't get money for the normal run of the mill routine type permit. But, also we found that most people are very willing to comply with the conditions of the permit; most people are very honest -- not in all cases, you know, there's always the rogue or the renegade. But people are honest and they want to do the best job. Especially if they want to get hired again.

Participant

We found that to be true with applicants. They typically want to do a good job. They want to be a good neighbor.

Participant

We had a discussion this morning in the first session about tiering and it's one concept that's very dear to me that we've had some rather good success with. And I'm wondering if anybody in this section has had any experience with it and any ideas that you might be able to give on the concept.

Participant

Well, I think that probably the simplest way to describe it is going from a very general group of actions and looking at those general groups and analyzing it. That's the first tier. Second tier is then a second more site specific look at an action. It could be two separate NEPA reviews. And you gain from the general to the extent that you don't have to do over and over and over again the same evaluation of impacts or alternatives for the site specific if you have determined that they're significant in the general. And it has saved us a great deal of time.

Nancy

The point is that once you analyze a problem in a general programmatic EIS you don't go back and make the same analysis in the site specific EIS.

Participant

We just attempted something which we think is tiering.

Participant

What's the difference between tiering and a supplemental EIS?

Participant

That's what we did except that we wrote a programmatic environmental impact statement on a chemical weapon system. This is a system that's still under development. So in our programmatic EIS that we published in draft stage -- that's why I don't know how successful we've been -- we put it out where we still had holes in our development like in air quality in the manufacturing plant because none has ever been manufactured before. We pointed out that we know this much now; we're going to continue studies and it will be addressed in tiered document. It is supplemental in the sense that it's going to come later but it's also tiered in the sense that it will not rehash anything that we've already discussed. It will take up where we left off so to speak. And there were a couple of instances like that and that's what we called it. I don't know if that's true tiering.

Participant

Aren't you thinking more about such things as wetlands disposal EIS where you go in and generically describe what will happen to a wetland if you put wastewater into it. Then on the site specific you're going to have different types of wetlands you'll have to examine so you'll have to do a supplemental but the general issue of wetlands has been addressed. Would you call that tiering?

Nancy

Well let's talk about that. A review of the on-going mission, continuing mission analysis might be very useful to the military body, but it's not necessarily required by NEPA. And it might be a good management tool and may be a very useful thing for them to do but you don't need to call it an EIS. If you want to do it under the management scheme you set up for doing EIS's that's fine.

Participant

What about the language in the regulations that has been interpreted to require EISs on continuing activities?

Nancy

There are certain kinds of federal actions that are of a continuing nature which may require an EIS. But to do an EIS on West Point because West Point isn't going to go away, in my view, is not required by NEPA and doesn't fit into the definition of "major federal action" in the Act. To give you all the background on this situation, the Army decided to do an EIS on West Point. They got an inquiry from their oversight committee on the Hill as to why they were spending $300,000 to do this and the proposed response was that it was required by NEPA. As I said, if they want to do an EIS because it's a useful management tool for them, great -- do it. But NEPA certainly doesn't require it. There's no proposal. The "proposal" is merely to continue what you've been doing for 200 years. And to the extent that they have to come up with alternatives that are not real alternatives -- discuss shutting it down? That's just not a real alternative. That's not what NEPA's all about.

Participant

Different subject. Is there any difference in the feelings at CEQ about the prohibition of using the AE to do EIS and design work?

Nancy

What is the controversy?

Participant

...the controversy from the DOD side of the house is that we can not utilize the same AE for design work and EIS work.

Participant

I can tell you what the previous thinking on this was because I was actively involved in discussions with CEQ on the matter. The thinking was that if a consulting firm can have some reasonable expectation of a continuation in a project from a design standpoint, that would prejudice them or make them not an objective party for doing an independent evaluation of alternatives. They would have a mjaor interest in the outcome of the first part. The larger the project, the more money that they might then be able to garner through the step two or the next part of the process.

Participant

Well, from a DOD standpoint our programs are fairly well outlined ... construction program and if we've got a project that we're anticipating in the FY'86 budget a program and we want to hire an AE to do the EIS ... the environmental documentation, it doesn't make sense to me to have to pay two consulting firms to do the same job because the guy that's doing the environmental documentation is going to do probably up to the 30% submittal in design work if he's going to do a good EIS.

Participant

That's a different situation. In construction grants program he's got three steps and if you get past the first step in planning and then you decide to do an EIS it would be ... I think it's a conflict of interest in his program to do that.

Participant

Would you have an initial contracting which would cover the environmental and design aspects?

Participant

I can see that as being a very real problem. Why would a consultant then propose or even fully consider the no action alternative. They would say "my goodness, if no action actually got selected here we would then not have this 70% additional we're counting on".

Participant

Within the military construction program he doesn't have the alternative really of saying "no action" unless during his thought process or work process he comes up with a situation that could totally preclude the proposed action. He doesn't have that choice when you come right down to the bottom line. Our military construction program is based on the assignment of mission of the activity and the overall national defense complex. And we might change siting within an activity, but we cannot change an overall program once it's been cast.

Participant

How about this? You have an applicant come in. It doesn't matter for what permit. How would you feel about the guy who is the consultant for the federal agency preparing the EIS and actually writing the comment if he is also the design consultant for the applicant. How would you feel about that?

Participant

I've never been on your side of the fence. I've always been on the other side.

Participant

Can I suggest that it's an area for review because the objective is to get an adequate environmental impact statement. That requires that reasonable alternatives are identified and analyzed. In every EIS the "no action" alternative has to be analyzed so, therefore, it seems like it should matter to the agency. If the agency has in-house expertise to adequately evaluate an ER then it doesn't make sense for them to have to hire a second firm to do the EIS. But if an agency doesn't have expertise, then the danger which the present regulations are trying to avoid is necessary. It's really important to have that.

Participant

Nancy, how about addressing just a little bit, if you don't mind, what you plan. You told me I believe over lunch that you got quite a few responses from your article. And how much you appreciated people writing in. Address how you are going to handle those.

Nancy

I see our activities proceeding in two ways. First, to the extend that the commenters identify specific problems with specific agencies' regulations. We will contact that agency, let them have the benefit of the commenter's views, and start a discussion with them to the extent that the commenter has identified a real problem. With respect to the more generic problems, we will deal with those in one of two ways. If the commenter has identified an area in the CEQ regulations that needs to be changed, I'm more than willing to undertake that process. It should be undertaken. If the commenter has identified ambiguities in regulations which can be solved or addressed through interpretive memorandum we will undertake that activity once we digest the comments and the merits of the comments. Actually, what I want to take away from this meeting is a better sense of what areas of the regulations we should be looking to for engaging in that activity. So, to the extent there are ambiguities in the regulations or you are having problems either understanding them or aplying them, tell me. That's what I want to hear. I also want to thank you for your candor and responsiveness today. I have appreciated hearing your views and encourage you to let us have the benefits of your thoughts on how the NEPA process can be improved.

ENVIRONMENTAL CONFLICT MANAGEMENT

Panel Members:	Mr. John Rushing
	Mr. Richard Jackson
	Mr. Robert Kerr
	Ms. Louise Franklin

Summary of Workshop on Environmental Conflict Management at the Fifth Annual Environmental Impact Statement Conference,
Atlanta, Georgia
22-23 October 1981

1. The workshop on Environmental Conflict Management was presented four times with each session being one and a half hours long. It was organized in a panel-discussion format with representatives from the Corps of Engineers and Georgia Conservancy as the panel members. An EPA representative from their Washington, DC office was also to have been a member of the panel but withdrew at the last minute due to travel restrictions. No replacement was provided.

2. Total attendance at the four workshops was about 120 people. Following prepared remarks by the panel members, an open discussion was held in each session. Copies of the remarks of the Chairman of the Workshop and the other panel members are attached. Major points noted during the discussions included the following:

a. Early and continuing communication is necessary to minimize conflicts. This includes communications within agencies as well as outside of agencies.

b. Differences of opinion between professionals may occur as a result of interpretation of the data base. Everyone involved in the process must understand the limitation of the data.

c. Use of an interdisciplinary team is important in the planning process.

d. Use of a neutral third party to help resolve conflicts is viable only when the parties in conflict are willing to accept the decision of the third party.

e. Should two parties not be able to resolve a conflict in a timely fashion, it should be escalated to higher level decision makers as soon as possible.

f. Training of environmental personnel in conflict management should be a top priority item in state and Federal agencies.

g. The "scoping process" should be used to minimize conflicts.

3. Audience participation revolved primarily around the above points. It was clear from the remarks made that there was considerable concern over the amount of time and money involved in "conflict management" and the lack of training provided in this area. The one solution to most of the "conflicts" appeared to be earlier involvement of the affected parties.

ENVIRONMENTAL CONFLICT MANAGEMENT

Presentation by John W. Rushing, Chief, Environmental Resources Branch,
South Atlantic Division, Corps of Engineers,
at the Workshop on Environmental Conflict Management
Atlanta, Georgia
October 22-23, 1981

I would like to welcome each of you to the workshop on Environmental Conflict Management and urge your participation in the discussions. The workshop is organized in a panel-discussion format with representatives from two Federal agencies - the Corps of Engineers and EPA - and a leading environmental organizatio in the State of Georgia - The Georgia Conservancy - as the panel.

Introduce panel members. NOTE: EPA, Washington, representative withdrew at the las minute due to travel restructions. No substitute was provided.

Following my brief remarks, each panel member will present his views on the subject and then the floor will be opened to discussion. I encourage you to take advantage of this opportunity to present your views and ask any questions you may have concerning how to deal with environmental conflicts. This session will end promptly in 1½ hours.

Disputes concerning environmental issues are not new. The environmental disputes of the 1970's have been well-documented and undoubtedly will continue in the 1980's. Prolonged, and sometimes bitter conflict involving government, developers, advocates of environmental protection, and the general public can be anticipated on issues suc as the siting of hazardous waste disposal and energy facilities, the control of toxi chemicals, protection of the coastal zone and certain critical environmental areas, and others.

Thomas Gladwin of New York University studied over 3,000 environmental disputes involving industrial facilities in 40 Western Nations during 1970-1978. He found that although the number of disputes has remained relatively constant since 1971, the characteristics of the disputes have changed. In the United States, environmental conflicts have spread from the northeast and midwest to the "sunbelt" states, and have come to include many types of facilities. The issues at stake have broadened from an early concern with air and water to include land use, quality of life issues, and increasingly, human health concerns.

Environmental conflicts have become more difficult to untangle as the number of issue in any particular conflict have increased. Disputes more frequently involve multiple parties as several levels of government and the "public" become deadlocked. Finally, the monetary costs of environmental regulations have increased dramatically for both government and industry.

What are we doing about this increasing problem of environmental conflict management? As noted by Wendy Emrich in "New Approaches to Managing Environmental Conflict: How Can the Federal Government Use Them?," prepared for the Council on Environmental Quality in June 1980, the Federal government is usually an important participant in most major environmental disputes; yet its ability to manage intense conflict often suffers. Ineffective Federal procedures can easily contribute to a stalemate among contending groups. Even the best of the known planning procedures and public participation programs can result in an impasse. Government agencies are therefore becoming increasingly aware that it is often the process followed to resolve issues that creates a problem, not only the substantive difficulties posed by the issues themselves.

Existing conflict resolution mechanisms reflect a long history of adversarial institutions and approaches. Adjudication, arbitration, administrative hearings and public meetings are founded on the principle of adversary proceedings. Opposing parties present their arguments in the most extreme terms in order to prove the "rightness" of their cases. Especially with complex environmental disputes, the final decision is not always perceived as a lasting or satisfactory solution. Further, the decision frequently stems from a procedural question and does not address the roots of the conflict. There are supposed "losers" and supposed "winners". Often the parties become more embittered and opposed to each other after the proceeding than before so that forces regroup and prepare for another battle.

Fortunately, people on all sides of environmental conflicts are realizing that there must be better ways to resolve differences. In many cases, there is movement by all parties to "be reasonable", to admit that issues seen as black and white in the heat of the early 70's may now seem more "gray" and therefore open to collaboration and compromise. Many groups are aware that no one may really be winning these confrontations; in fact, everyone may be losing.

In those cases in which collaboration or compromise is preferable, some innovative techniques - such as mediation and facilitation - are available. These approaches are not "the answer" to environmental disputes; indeed, there is no specific "answer". Each approach must be evaluated carefully for applicability in each case and used selectively. A Federal agency faced with conflict management problems need not rely wholly on administrative hearings, existing planning and regulatory procedures and litigation to anticipate, prevent and resolve disputes.

I would like to call on our panel members for their remarks. Please keep in mind any questions or comments you may wish to make following their remarks.

(At the end of workshop session, provide handout to attendees).

SADPD-R 20 October 1981

ENVIRONMENTAL CONFLICT MANAGEMENT

TITLE: New Approaches to Managing Environmental Conflict: How Can the Federal Government Use Them
AUTHOR: Wendy M. Emrich

TITLE: Environmental Conflict Resolution
AUTHOR: John Busterud

TITLE: Environmental Mediation: Fighting Fair
AUTHOR: Barbara J. Vaughn

TITLE: EnvironmentalMediation: Bridging the Gap Between Energy Needs and Ecosystem
AUTHOR: John Busterud

TITLE: Patterns of Environmental Conflict Over Industrial Facilities in the United States
AUTHOR: Thomas N. Gladwin

TITLE: Environmental Mediation: An Effective Alternative?
AUTHOR: Resolve Center For Environmental Conflict Resolution Report

TITLE: Mediating Environmental Disputes
AUTHOR: Laura M. Lake

TITLE: Mediation to Resolve Environmental Conflict: The Snohomish Experiment
AUTHOR: Jane McCarthy; Alice Shorett

TITLE: Mediation Office on Ecology Set Up
AUTHOR: Bayard Webster

TITLE: The Environmental Conflict
AUTHOR: New York Times

TITLE: Environmental Conflict - Resolution - The Promise of Cooperative Decision Making
AUTHOR: John Busterud

TITLE: Environmental Conflict Management
AUTHOR: American Arbitration Association Clark-McGlennon Associates, Inc.

CONFLICT MANAGEMENT

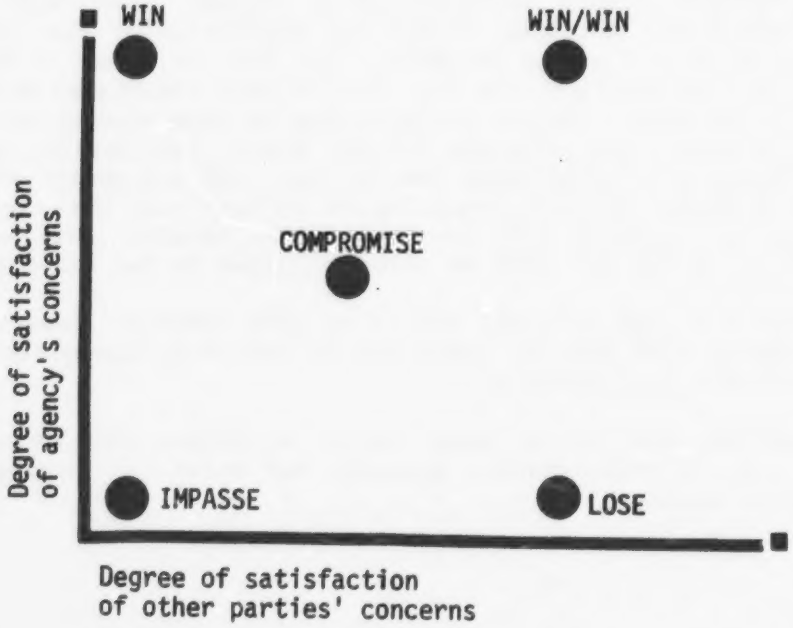
Presentation by Richard Jackson, Chief, Environmental Resources Branch,
Wilmington District, Corps of Engineers,
at the Workshop on Environmental Conflict Management
Atlanta, Georgia

October 22-23, 1981

We all experience conflict as agencies or as individuals. The question is how do we deal with conflict and are we successful at dealing with conflict? There are systematic ways to approach conflict management. Many of these methods and techniques are outlined in the literature which has been distributed as part of this workshop. What I would like to do is show you how some of these techniques can work for you in managing conflict by presenting a problem which we have had in our District.

The National Historic Preservation Act requires that a Federal agency examine any proposed action to determine if that action would have an adverse impact on historic properties or properties that might be eligible for the National Register of Historic Places. The property, if it is determined to be eligible, carries the same protection as if it were already on the National Register. The conflict which we have had to deal with is between Wilmington District and the State Historic Preservation Officer concerning what constitutes an adequate survey to satisfy the law. In our opinion, the State has been asking us to do more survey than is necessary. We deal with the State in essentially three areas: historic properties or structures, on-the-land archeology, and underwater archeology. We have not had disagreements or conflicts concerning the first two areas of investigation, but we have had a continuing problem in the third area.

The first step in dealing with a conflict of any nature is to assess your position and to examine the position of the other person. It is helpful in this step to use one of the models from the literature.


WIN
WIN/WIN
COMPROMISE
IMPASSE
LOSE
Degree of satisfaction of agency's concerns
Degree of satisfaction of other parties' concerns

In examining this model you can see that our satisfaction is on the ordinate and the State's or others' satisfaction is on the other axis. Our first question to ourselves was to determine where we are in relation to this joint outcome space. What do we want to get from the resolution of this conflict? What is our position? Our position is simply to identify and protect properties either on or eligible for the National Register. It's not surprising that that is exactly the same position that the State of North Carolina has. Therefore, in examining the model at hand and examining our position, we determined that we both had the same desire and that to seek a resolution of our conflict, we should recognize that we are seeking a win/win solution. An approach strategy can be selected from collaboration which is a voluntary entering into an agreement involving cooperation and mutual trust. Collaboration is best evidenced when there is a win/win situation. On the other extreme, some conflicts involve a win/lose situation. That is, if one party wins, the other party must lose, and there is no ground for compromise. Competition is best exemplified by litigation. Somewhere in between those two extremes is the idea of negotiation. In some cases either party can give up part of what they wish, which raises the satisfaction of the other. In negotiation, you may bargain, compromise, or split the difference.

Some important questions that also need to be addressed would be to consider, first of all, what is the desired relationship with the other person. If you only have to deal with the person in this one instance and will never see this person again, then you can be abrupt. If, however, you have to deal with this person on a continuing basis, then you need to consider development of a better relationship. In our case we do have to deal with the State on a daily basis. Therefore, the idea of a future relationship is important in determining our strategy. Are the stakes high or low? For us the stakes are high in this conflict because the amount of funds that can be spent toward investigation is limited. Therefore, we are willing to devote energy and time toward the resolution of the conflict. The third question is a question of power. Who has the power or relative power in resolving the conflict? In our conflict with the State, we believe that we have all the power. In the projects that we have reached an impasse on, everyone, including the Governor of the State, the public, and the Corps, was willing to proceed with the project and was happy with the project, but the State Historic Preservation Officer and his staff were holding the project pending the review of the studies that we have conducted. Therefore, we felt that we have more power in the situation.

The fourth question to ask yourself has to do with interest compatibility. Are the interests of both parties compatible or are they incompatible? In our case the interest is compatible.

All of the questions that we had asked led us to believe that we would be able to enter into a collaborative approach and solve our problem in a mutually agreeable manner.

Because the issue at hand was somewhat complex, we decided to consider some ideas for managing complexities including concepts of early resolution, which involves early involvement. We also considered the idea of data management. Many times the facts and values involved with the conflict are important in simplifying the problem, with even resolving problems in some cases. What factors are relative to the decision at hand? Are there hidden assumptions involved? All of these questions must be addressed in data management. Thirdly, one might break the conflict down into subissues or smaller issues that can be handled separately and resolved by themselves. And, lastly, we considered a multi-tiered approach. It's not important for the chairman of the board or the president or the District Engineer to get involved in every decision. We, therefore, decided to attack the conflict at the lowest possible level and attempt to resolve all issues that we could before elevating unresolved questions to higher levels. Our first step was to meet with the principals involved with the project. We traveled to Raleigh and talked with the chief of the Archeology Branch and the staff of the underwater archeologic group just in general terms to meet them face to face. Next, we met with the State's technical staff in a 2-hour session and dealt with four issues. The first issue was data or information. We found that the State had information which we didn't have: information that led them to draw conclusions that we did not. We agreed therefore to share data more effectively. The State has also agreed to use the Research Branch to do archival research prior to developing positions on projects. The Corps also agreed that we share archival responsibilities. Next we dealt with probability modeling. When the State met with us, they showed us a model which they had started to develop. We like the model and intend to build on it. It has to do with high, medium, and low probability based on archival research.

Probability of Encountering Vessels

		HIGH	MEDIUM	LOW
Bottom Disturbance	MAJOR	Magnetic Survey etc.		
	MINOR	Magnetic Survey Only		No Further Work

The third area was survey methods. Before our meeting the State had suggested that all project areas must be surveyed using a magnetometer to measure the earth's magnetic field. Deflections in the field (anomalies) will be evidenced whenever the magnetometer is passing over a submerged vessel. The State has suggested that all anomalies should be dived on to further investigate. As a result of our conference, we agreed that not all anomalies will be important nor will they be dived on, but that we should develop an expectation of gamma deflections in the earth's field based on archival research and the type of vessel that we might anticipate finding. Therefore, we can dismiss certain smaller anomalies as obviously not meeting our criteria. We need to do further work in survey methodology. Considerable progress has been met.

The last area that we dealt with in our meeting was the concept of National Register criteria. This is the most difficult of all the issues. Out of all the 2,000 known wrecks in North Carolina, only two are on the National Register. The question has to do with what point does a vessel become important enough to place it on the National Register. What kinds of criteria would one use to do that? We've looked at several areas including naval architecture. The question there is whether the vessel adds significantly to our knowledge of naval architecture during the time when few or no records were kept. In some cases the cargo of the vessel itself may be important. It may make this site National Register eligible. If the vessels were associated with a great and important person or battle, then that might make the vessel eligible for the National Register by itself. For instance, if we found the rowboat that George Washington crossed the Deleware in, then that rowboat would, because of its association with that great person, be eligible for the National Register.

The Wilmington District has a conflict over what constitutes adequate surveys under the National Historic Preservation Act. We are dealing with that conflict using methods available in the literature. Because of the nature of the problem, we decided to attack it from a calibration point of view. We believe we are making significant progress. The key to both avoiding and resolving conflicts is communication - open, free, and full communication between the parties.

EIS CONFERENCE

Presentation by Robert Kerr, Executive Director,
the Georgia Conservancy
at the Workshop on Environmental Conflict Management
Atlanta, Georgia
October 22-23, 1981

I'm pleased to be a part of the panel on conflict resolution - unfortunately, it implies an expertise that I do not have. The Georgia Conservancy is often in an advocacy role, but very rarely in a conflict mediation role.

On those rare occasions when we've tried to both mediate and advocate, we've gotten into a no-win situation. The Cumberland Island controversy is an example. In that instance, we tried to develop a consitituency for acceptance of a General Management plan while simultaneously trying to work within the structure to eliminate the bad aspects of the plan. The perception was that we had caved in to the Departmen of Interior and sold our environmental heritage for a mess of porridge.

LESSON: Know your role in the conflict. We are now faced with another potential no-win situation. I've been asked to chair a mediation task force that will bring together elected local officials - or their representatives - with officers of industries that are in the hazardous waste disposal business. The purpose is to identify and resolve as many of the conflicts surrounding that issue as possible. Of course, some of the industry representatives believe we are opposed to hazardous waste sites while some of the elected officials think we're trying to put one in their county. Of course, to be effective we will have to dispel both those perceptions when we begin the process.

LESSON: It may be that it requires less skill to be an adversary than a peace-maker. However, in our adversarial role, I would like to point out that the Conservancy does attempt to develop pragmatic positions that balance economic, social, cultural, and environmental values.

In preparing for my role as a mediator, I've begun some reading and discussion on the process. It appears that the art of conflict resolution that attempts to make bot sides believe realistically that they've won is relatively new.

Traditionally, the practice of conflict resolution has been of the win or lose kind. And with the Corps of Engineers, it basically still is. Either the damn dam gets built or the damn dam doesn't. Impact mitigation isn't resolution. Castor oil tastes better with sugar than without it, but it's still castor oil.

I pick on the Corps, but the fact is that as mandates to give ample consideration to all of the multiplicities of values that we as groups and individuals hold are implemented, so are the opportunities for environmental conflict increased. If, as some would like to see it, we only considered the dollar cost vs. the dollar benefit, the issues are much easier to identify and resolve.

That may come to pass, but at the moment there are still mandates which call for proper consideration of differing perceptions and values. So there are inevitable conflicts. And the numbers are escalating.

Another factor is that the decisions are no longer simple ones. It's no longer a question of clean air or clean water, but how clean and at what cost.

Solutions arrived at in court are of the win/lose type and are expensive and time consuming.

So the experts suggest for decision makers, that as we examine and wrestle with difficult issues, to avoid the costly delays, we should give more attention to the process by which decisions are reached.

Obviously the EIS processes and various standards and procedures and guidelines were originally intended to help in the identification and resolution of conflicts. Unfortunately, many agencies and applicants view them as burdens or obstacles to be dealt with as quickly as possible in order to get on with the business at hand, or, even worse, as a vehicle for justifying decisions already made.

When that happens, the EIS document simply becomes a weapon to be used by both sides as the opposers simply rummage through it for additional evidence that the preparer is a charlaton or, even worse, incompetent.

So the experts are suggesting that a first step in conflict resolution is to complete the process in a professional way and with an open mind. I agree with that, but would also suggest that the evaluators of the documents, including the opponents, do the same.

Conflict, in and of itself, isn't necessarily bad. In fact, properly channeled and constructively used, it can be healthy. Better decisions can often be reached throug a healthy dialogue that includes disagreement. It's when conflict reaches the point where violence becomes a real possibility, as it has in Georgia over the issue of hazardous waste, or when conflict causes the opponents to be so polarized they cannot resolve the dispute themselves, or when the courts are the resort of resolution and costs escalate beyond reason -- then, in those instances, we have a problem.

The experts suggests that in those instances we look for different mechanisms of resolution. The terms used are "cooperative decision making," "conflict management," -- all of which imply a desire on the part of both parties to amicably resolve the issue, or at least to recognize an inability to resolve it.

So the challenge then is how to achieve sound environmental policies which have a broad base of public support and which take into account the full range of values.

I suggest, as a first step, a reordering of laws, policies, regulations, and processe that recognize environmental policies as an objective and are written in clear, preci and simple language so that they are implementable.

I agree with the experts and suggest as a next step a willingness to use the data collection, analysis, and decision process with integrity.

And, third, I believe that to avoid unnecessary delays and costs when good intentions and efforts fail to achieve a resolution, that a neutral third party can become a viable alternative to litigation.

Some years ago I was asked to develop a conference to draw participants from the Eastern U.S. together to discuss, identify and, where possible, offer mechanisms for resolution of issues dealing with the Forest Service's RARE II process.

The first step was to bring a steering committee together to decide on the detailed objectives, subjects, and agenda for the conference. The second step was to recognize that the committee represented different perspectives on how the forests should be managed and used, i.e., timber cutting, off-road vehicle users and wilderness advocates.

The third step was to employ a neutral third party -- a mediator to deal with the inevitable conflicts. He was Gerald Cormick who is recognized as a pioneer in the conflict management field. As a result we were able to move through the disagreements and had a successful conference.

Malcolm Rivkin, a successful project mediator, is a proponent of the EIS process. He says, "It (EIS) has done much to facilitate accommodation and compromise. The EIS can set the stage for negotiation in project design and management and, most importantly, can remove some powerful constraints to governmental and citizen participation in the negotiation process".

Two points - one - EIS litigation is frequently over procedural issues, not substantive (ones), whereas other mechanisms can focus on issues and concensus agreement.

Second point - Citizen participation - "people's democracy" is in jeopardy in the present administration. Yet, properly used early in the decision process, citizen participation can help focus on the identification of issues and on consensual agreement.

There are some processes known collectively as non-adversarial forms of environmental conflict management. They include conflict anticipation, fact finding, consensus building, and mediation. They, along with meaningful use of public participation, offer some alternative processes to litigation.

Since we are short a person, I will add some thoughts on EIS problems which promote conflict or distrust to my original prepared remarks.

1. Often sham exercises to cover your behind on decisions already reached.

2. Decisions made and implemented w/o adequate public promotion/sewer lines.

3. Too often agencies use no significant finding documents - environmental assessment - simply to avoid the work of an EIS. Particularly when the project is economically marginal.

4. Failure to involve interested groups early on scoping or conflict participation phase of a project.

5. Failure to recognize citizens no longer trust Governmental Bureaucracies or elected officials to make decisions that benefit the most with the least cost and negative impact.

6. EIS's that devote more than 75% of the effort and more than 50% of the documentation to the "preferred" of several alternatives.

7. A belief by citizens that political pressures have more weight than all the support data does.

8. Support data that is apparently inadequate, erroneous, or skewed.

9. Academic prostitutes who give credibility to shoddy data or conclusions.

10. Professionals (including scientists) who let their personal biases interfere with their judgment.

11. Notice and timing of review process of draft or final documents - an 8 year study cannot be properly evaluated, and a complete response prepared in 30-90 days.

12. A failure to give proper weight to cost of money in cost/benefit analysis - 18%,not 4 or 5.

13. Segmentation - highway or other projects which can be broken down into pieces for evaluation - you get to build both ends which makes it difficult to oppose the middle.

14. The agency doing the implementation of a project is sometimes the agency doing the planning.

So the challenge as I said earlier is "to achieve sound environmental policies and projects which have broad public support and which take into account the range of values in our society".

NEPA and the EIS process and mandated public participation are all significant steps to meeting those challenges.

I submit however that better conflict management techniques are necessary to replace litigation or the threat of it. I will mention some of these techniques again. All using neutral third parties.

a. Conflict anticipation - scoping to foresee problems and issues.

b. Joint fact finding - an effort to narrow issues to pertinent ones.

c. Identifying common objectives - consensus building - an attempt to reach agreement on critical facts and issues.

d. Mediator - mediation - an attempt to focus discussion and reach some decisions on alternatives.

For example: we'll build a little damn dam instead of a big damn dam as long as we can build a damn dam.

Thank you

OUNCIL ON ENVIRONMENTAL UALITY

0 CFR Parts 1500, 1501, 1502, 1503, 504, 1505, 1506, 1507, and 1508

orty Most Asked Questions oncerning CEQ's National nvironmental Policy Act Regulations

arch 17, 1981.

GENCY: Council on Environmental uality, Executive Office of the resident.

CTION: Information Only: Publication of Memorandum to Agencies Containing Answers to 40 Most Asked Questions on NEPA Regulations.

SUMMARY: The Council on Environmental Quality, as part of its oversight of implementation of the National Environmental Policy Act, held meetings in the ten Federal regions with Federal, State, and local officials to discuss administration of the implementing regulations. The forty most asked questions were compiled in a memorandum to agencies for the information of relevant officials. In order efficiently to respond to public inquiries this memorandum is reprinted in this issue of the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Nicholas C. Yost, General Counsel, Council on Environmental Quality, 722 Jackson Place NW., Washington, D.C. 20006; 202-395-5750.

March 16, 1981.

Memorandum for Federal NEPA Liaisons, Federal, State, and Local Officials and Other Persons Involved in the NEPA Process

Subject: Questions and Answers About the NEPA Regulations

During June and July of 1980 the Council on Environmental Quality, with the assistance and cooperation of EPA's EIS Coordinators from the ten EPA regions, held one-day meetings with federal, state and local officials in the ten EPA regional offices around the country. In addition, on July 10, 1980, CEQ conducted a similar meeting for the Washington, D.C. NEPA liaisons and persons involved in the NEPA process. At these meetings CEQ discussed (a) the results of its 1980 review of Draft EISs issued since the July 30, 1979 effective date of the NEPA regulations, (b) agency compliance with the Record of Decision requirements in Section 1505 of the NEPA regulations, and (c) CEQ's preliminary findings on how the scoping process is working. Participants at these meetings received copies of materials prepared by CEQ summarizing its oversight and findings.

These meetings also provided NEPA liaisons and other participants with an opportunity to ask questions about NEPA and the practical application of the NEPA regulations. A number of these questions were answered by CEQ representatives at the regional meetings. In response to the many requests from the agencies and other participants, CEQ has compiled forty of the most important or most frequently asked questions and their answers and reduced them to writing. The answers were prepared by the General Counsel of CEQ in consultation with the Office of Federal Activities of EPA. These answers, of course, do not impose any additional requirements beyond those of the NEPA regulations. This document does not represent new guidance under the NEPA regulations, but rather makes generally available to concerned agencies and private individuals the answers which CEQ has already given at the 1980 regional meetings. The answers also reflect the advice which the Council has given over the past two years to aid agency staff and consultants in their day-to-day application of NEPA and the regulations.

CEQ has also received numerous inquiries regarding the scoping process. CEQ hopes to issue written guidance on scoping later this year on the basis of its special study of scoping, which is nearing completion.

Nicholas C. Yost,
General Counsel.

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Questions and Answers About the NEPA Regulations (1981)

1a. Q. What is meant by "range of alternatives" as referred to in Sec. 1505.1(e)? [1]

A. The phrase "range of alternatives" refers to the alternatives discussed in environmental documents. It includes all reasonable alternatives, which must be rigorously explored and objectively evaluated, as well as those other alternatives, which are eliminated from detailed study with a brief discussion of the reasons for eliminating them. Section 1502.14. A decisionmaker must not consider alternatives beyond the range of alternatives discussed in the relevant environmental documents. Moreover, a decisionmaker must, in fact, consider all the alternatives discussed in an EIS. Section 1505.1(e).

1b. Q. How many alternatives have to be discussed when there is an infinite number of possible alternatives?

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[1] References throughout the document are to the Council on Environmental Quality's Regulations For Implementing The Procedural Provisions of the National Environmental Policy Act, 40 CFR Parts 1500-1508.

A. For some proposals there may exist a very large or even an infinite number of possible reasonable alternatives. For example, a proposal to designate wilderness areas within a National Forest could be said to involve an infinite number of alternatives from 0 to 100 percent of the forest. When there are potentially a very large number of alternatives, only a reasonable number of examples, covering the *full spectrum* of alternatives, must be analyzed and compared in the EIS. An appropriate series of alternatives might include dedicating 0, 10, 30, 50, 70, 90, or 100 percent of the Forest to wilderness. What constitutes a reasonable range of alternatives depends on the nature of the proposal and the facts in each case.

2a. Q. If an EIS is prepared in connection with an application for a permit or other federal approval, must the EIS rigorously analyze and discuss alternatives that are outside the capability of the applicant or can it be limited to reasonable alternatives that can be carried out by the applicant?

A. Section 1502.14 requires the EIS to examine all reasonable alternatives to the proposal. In determining the scope of alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are *practical or feasible* from the technical and economic standpoint and using common sense, rather than simply *desirable* from the standpoint of the applicant.

2b. Q. Must the EIS analyze alternatives outside the jurisdiction or capability of the agency or beyond what Congress has authorized?

A. An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d). Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).

3. Q. What does the "no action" alternative include? If an agency is under a court order or legislative command to act, must the EIS address the "no action" alternative?

A. Section 1502.14(d) requires the alternatives analysis in the EIS to "include the alternative of no action." There are two distinct interpretations of "no action" that must be considered, depending on the nature of the proposal being evaluated. The first situation might involve an action such as updating a land management plan where ongoing programs initiated under existing legislation and regulations will continue, even as new plans are developed. In these cases "no action" is "no change" from current management direction or level of management intensity. To construct an alternative that is based on no management at all would be a useless academic exercise. Therefore, the "no action" alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the existing plan. In this case, alternatives would include management plans of both greater and lesser intensity, especially greater and lesser levels of resource development.

The second interpretation of "no action" is illustrated in instances involving federal decisions on proposals for projects. "No action" in such cases would mean the proposed activity would not take place, and the resulting environmental effects from taking no action would be compared with the effects of permitting the proposed activity or an alternative activity to go forward.

Where a choice of "no action" by the agency would result in predictable actions by others, this consequence of the "no action" alternative should be included in the analysis. For example, if denial of permission to build a railroad to a facility would lead to construction of a road and increased truck traffic, the EIS should analyze this consequence of the "no action" alternative.

In light of the above, it is difficult to think of a situation where it would *not* be appropriate to address a "no action" alternative. Accordingly, the regulations require the analysis of the no action alternative even if the agency is under a court order or legislative command to act. This analysis provides a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives. It is also an example of a reasonable alternative outside the jurisdiction of the agency which must be analyzed. Section 1502.14(c). See Question 2 above. Inclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA. Section 1500.1(a).

4a. Q. What is the "agency's preferred alternative"?

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

4b. Q. Does the "preferred alternative" have to be identified in the Draft EIS and the Final EIS or just in the Final EIS?

A. Section 1502.14(e) requires the section of the EIS on alternatives to "identify the agency's preferred alternative if one or more exists, in the draft statement, and identify such alternative in the final statement . . ." This means that if the agency has a preferred alternative at the Draft EIS stage, that alternative must be labeled or identified as such in the Draft EIS. If the responsible federal official in fact has no preferred alternative at the Draft EIS stage, a preferred alternative need not be identified there. By the time the Final EIS is filed, Section 1502.14(e) presumes the existence of a preferred alternative and requires its identification in the Final EIS "unless another law prohibits the expression of such a preference."

4c. Q. Who recommends or determines the "preferred alternative?"

A. The lead agency's official with line responsibility for preparing the EIS and assuring its adequacy is responsible for identifying the agency's preferred alternative(s). The NEPA regulations do not dictate which official in an agency shall be responsible for preparation of EISs, but agencies can identify this official in their implementing procedures, pursuant to Section 1507.3.

Even though the agency's preferred alternative is identified by the EIS preparer in the EIS, the statement must be objectively prepared and not slanted to support the choice of the agency's preferred alternative over the other reasonable and feasible alternatives.

5a. Q. Is the "proposed action" the same thing as the "preferred alternative"?

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is ternally generated..such as preparing a nd management plan, the proposed tion might end up as the agency's eferred alternative. On the other hand e proposed action may be granting an plication to a non-federal entity for a rmit. The agency may or may not have "preferred alternative" at the Draft EIS age (see Question 4 above). In that se the agency may decide at the Final S stage, on the basis of the Draft EIS d the public and agency comments, at an alternative other than the oposed action is the agency's referred alternative."

5b. Q. Is the analysis of the "proposed ction" in an EIS to be treated fferently from the analysis of ternatives?

A. The degree of analysis devoted to ach alternative in the EIS is to be bstantially similar to that devoted to e "proposed action." Section 1502.14 is tled "Alternatives including the roposed action" to reflect such mparable treatment. Section 502.14(b) specifically requires substantial treatment" in the EIS of ach alternative including the proposed ction. This regulation does not dictate n *amount* of information to be rovided, but rather, prescribes a *level f treatment*, which may in turn require arying amounts of information, to nable a reviewer to evaluate and ompare alternatives.

6a. Q. What is the meaning of the term environmentally preferable lternative" as used in the regulations ith reference to Records of Decision? ow is the term "environment" used in e phrase?

A. Section 1505.2(b) requires that, in ases where an EIS has been prepared, e Record of Decision (ROD) must dentify all alternatives that were onsidered, ". . . specifying the lternative or alternatives which were onsidered to be environmentally referable." The environmentally referable alternative is the alternative hat will promote the national nvironmental policy as expressed in EPA's Section 101. Ordinarily, this eans the alternative that causes the east damage to the biological and hysical environment; it also means the lternative which best protects, reserves, and enhances historic, ultural, and natural resources.

The Council recognizes that the dentification of the environmentally referable alternative may involve ifficult judgments, particularly when ne environmental value must be alanced against another. The public nd other agencies reviewing a Draft IS can assist the lead agency to evelop and determine environmentally preferable alternatives by providing their views in comments on the Draft EIS. Through the identification of the environmentally preferable alternative, the decisionmaker is clearly faced with a choice between that alternative and others, and must consider whether the decision accords with the Congressionally declared policies of the Act.

6b. Q. Who recommends or determines what is environmentally preferable?

A. The agency EIS staff is encouraged to make recommendations of the environmentally preferable alternative(s) during EIS preparation. In any event the lead agency official responsible for the EIS is encouraged to identify the environmentally preferable alternative(s) in the EIS. In all cases, commentors from other agencies and the public are also encouraged to address this question. The agency must identify the environmentally preferable alternative in the ROD.

7. Q. What is the difference between the sections in the EIS on "alternatives" and "environmental consequences"? How do you avoid duplicating the discussion of alternatives in preparing these two sections?

A. The "alternatives" section is the heart of the EIS. This section rigorously explores and objectively evaluates all reasonable alternatives including the proposed action. Section 1502.14. It should include relevant comparisons on environmental and other grounds. The "environmental consequences" section of the EIS discusses the specific environmental impacts or effects of each of the alternatives including the proposed action. Section 1502.16. In order to avoid duplication between these two sections, most of the "alternatives" section should be devoted to describing and comparing the alternatives. Discussion of the environmental impacts of these alternatives should be limited to a concise descriptive summary of such impacts in a comparative form, including charts or tables, thus sharply defining the issues and providing a clear basis for choice among options. Section 1502.14. The "environmental consequences" section should be devoted largely to a scientific analysis of the direct and indirect environmental effects of the proposed action and of each of the alternatives. It forms the analytic basis for the concise comparison in the "alternatives" section.

8. Q. Section 1501.2(d) of the NEPA regulations requires agencies to provide for the early application of NEPA to cases where actions are planned by private applicants or non-Federal entities and are, at some stage, subject to federal approval of permits, loans, loan guarantees, insurance or other actions. What must and can agencies do to apply NEPA early in these cases?

A. Section 1501.2(d) requires federal agencies to take steps toward ensuring that private parties and state and local entities initiate environmental studies as soon as federal involvement in their proposals can be foreseen. This section is intended to ensure that environmental factors are considered at an early stage in the planning process and to avoid the situation where the applicant for a federal permit or approval has completed planning and eliminated all alternatives to the proposed action by the time the EIS process commences or before the EIS process has been completed.

Through early consultation, business applicants and approving agencies may gain better appreciation of each other's needs and foster a decisionmaking process which avoids later unexpected confrontations.

Federal agencies are required by Section 1507.3(b) to develop procedures to carry out Section 1501.2(d). The procedures should include an "outreach program", such as a means for prospective applicants to conduct pre-application consultations with the lead and cooperating agencies. Applicants need to find out, in advance of project planning, what environmental studies or other information will be required, and what mitigation requirements are likely, in connecton with the later federal NEPA process. Agencies should designate staff to advise potential applicants of the agency's NEPA information requirements and should publicize their pre-application procedures and information requirements in newsletters or other media used by potential applicants.

Complementing Section 1501.2(d), Section 1506.5(a) requires agencies to assist applicants by outlining the types of information required in those cases where the agency requires the applicant to submit environmental data for possible use by the agency in preparing an EIS.

Section 1506.5(b) allows agencies to authorize preparation of environmental assessments by applicants. Thus, the procedures should also include a means for anticipating and utilizing applicants' environmental studies or "early corporate environmental assessments" to fulfill some of the federal agency's NEPA obligations. However, in such cases the agency must still evaluate independently the environmental issues and take responsibility for the environmental assessment.

These provisions are intended to encourage and enable private and other non-federal entities to build environmental considerations into their own planning processes in a way that facilitates the application of NEPA and avoids delay.

9. Q. To what extent must an agency inquire into whether an applicant for a federal permit, funding or other approval of a proposal will also need approval from another agency for the same proposal or some other related aspect of it?

A. Agencies must integrate the NEPA process into other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts. Specifically, the agency must "provide for cases where actions are planned by . . . applicants," so that designated staff are available to advise potential applicants of studies or other information that will foreseeably be required for the later federal action; the agency shall consult with the applicant if the agency foresees its own involvement in the proposal; and it shall insure that the NEPA process commences at the earliest possible time. Section 1501.2(d). (See Question 8.)

The regulations emphasize agency cooperation early in the NEPA process. Section 1501.6. Section 1501.7 on "scoping" also provides that all affected Federal agencies are to be invited to participate in scoping the environmental issues and to identify the various environmental review and consultation requirements that may apply to the proposed action. Further, Section 1502.25(b) requires that the draft EIS list all the federal permits, licenses and other entitlements that are needed to implement the proposal.

These provisions create an affirmative obligation on federal agencies to inquire early, and to the maximum degree possible, to ascertain whether an applicant is or will be seeking other federal assistance or approval, or whether the applicant is waiting until a proposal has been substantially developed before requesting federal aid or approval.

Thus, a federal agency receiving a request for approval or assistance should determine whether the applicant has filed separate requests for federal approval or assistance with other federal agencies. Other federal agencies that are likely to become involved should then be contacted, and the NEPA process coordinated, to insure an early and comprehensive analysis of the direct and indirect effects of the proposal and any related actions. The agency should inform the applicant that action on its application may be delayed unless it submits all other federal applications (where feasible to do so), so that all the relevant agencies can work together on the scoping process and preparation of the EIS.

10a. Q. What actions by agencies and/or applicants are allowed during EIS preparation and during the 30-day review period after publication of a final EIS?

A. No federal decision on the proposed action shall be made or recorded until at least 30 days after the publication by EPA of notice that the particular EIS has been filed with EPA. Sections 1505.2 and 1506.10. Section 1505.2 requires this decision to be stated in a public Record of Decision.

Until the agency issues its Record of Decision, no action by an agency or an applicant concerning the proposal shall be taken which would have an adverse environmental impact or limit the choice of reasonable alternatives. Section 1506.1(a). But this does not preclude preliminary planning or design work which is needed *to support an application* for permits or assistance. Section 1506.1(d).

When the impact statement in question is a program EIS, no major action concerning the program may be taken which may significantly affect the quality of the human environment, unless the particular action is justified independently of the program, is accompanied by its own adequate environmental impact statement and will not prejudice the ultimate decision on the program. Section 1506.1(c).

10b. Q. Do these limitations on action (described in Question 10a) apply to state or local agencies that have statutorily delegated responsibility for preparation of environmental documents required by NEPA, for example, under the HUD Block Grant program?

A. Yes, these limitations do apply, without any variation from their application to federal agencies.

11. Q. What actions must a lead agency take during the NEPA process when it becomes aware that a non-federal applicant is about to take an action within the agency's jurisdiction that would either have an adverse environmental impact or limit the choice of reasonable alternatives (e.g., prematurely commit money or other resources towards the completion of the proposal)?

A. The federal agency must notify the applicant that the agency will take strong affirmative steps to insure that the objectives and procedures of NEPA are fulfilled. Section 1506.1(b). These steps could include seeking injunctive measures under NEPA, or the use of sanctions available under either the agency's permitting authority or statutes setting forth the agency's statutory mission. For example, the agency might advise an applicant that if it takes such action the agency will not process its application.

12a. Q. What actions are subject to the Council's new regulations, and what actions are grandfathered under the old guidelines?

A. The effective date of the Council's regulations was July 30, 1979 (except for certain HUD programs under the Housing and Community Development Act, 42 U.S.C. 5304(h), and certain state highway programs that qualify under Section 102(2)(D) of NEPA for which the regulations became effective on November 30, 1979). All the provisions of the regulations are binding as of that date, including those covering decisionmaking, public participation, referrals, limitations on actions, EIS supplements, etc. For example, a Record of Decision would be prepared even for decisions where the draft EIS was filed before July 30, 1979.

But in determining whether or not the new regulations apply to the preparation of a *particular environmental document*, the relevant factor is the date of filing of the draft of that document. Thus, the new regulations do not require the redrafting of an EIS or supplement if the draft EIS or supplement was filed before July 30, 1979. However, a supplement prepared after the effective date of the regulations for an EIS issued in final before the effective date of the regulations would be controlled by the regulations.

Even though agencies are not required to apply the regulations to an EIS or other document for which the draft was filed prior to July 30, 1979, the regulations encourage agencies to follow the regulations "to the fullest extent practicable," i.e., if it is feasible to do so, in preparing the final document. Section 1506.12(a).

12b. Q. Are projects authorized by Congress before the effective date of the Council's regulations grandfathered?

A. No. The date of Congressional authorization for a project is not determinative of whether the Council's regulations or former Guidelines apply to the particular proposal. No incomplete projects or proposals of any kind are grandfathered in whole or in part. Only certain environmental documents, for which the draft was issued before the effective date of the regulations, are grandfathered and ubject to the Council's former uidelines.

12c. Q. Can a violation of the egulations give rise to a cause of ction?

A. While a trivial violation of the egulations would not give rise to an ndependent cause of action, such a ause of action would arise from a ubstantial violation of the regulations. ection 1500.3.

13. Q. Can the scoping process be sed in connection with preparation of n environmental assessment, i.e., efore both the decision to proceed with n EIS and publication of a notice of ntent?

A. Yes. Scoping can be a useful tool or discovering alternatives to a roposal, or significant impacts that may ave been overlooked. In cases where n environmental assessment is being repared to help an agency decide whether to prepare an EIS, useful nformation might result from early articipation by other agencies and the ublic in a scoping process.

The regulations state that the scoping rocess is to be preceded by a Notice of ntent (NOI) to prepare an EIS. But that s only the minimum requirement. Scoping may be initiated earlier, as long as there is appropriate public notice and nough information available on the roposal so that the public and relevant agencies can participate effectively.

However, scoping that is done before the assessment, and in aid of its reparation, cannot *substitute* for the ormal scoping process after publication of the NOI, unless the earlier public otice stated clearly that this possibility was under consideration, *and* the NOI expressly provides that written comments on the scope of alternatives and impacts will still be considered.

14a. Q. What are the respective rights and responsibilities of lead and cooperating agencies? What letters and memoranda must be prepared?

A. After a lead agency has been designated (Sec. 1501.5), that agency has the responsibility to solicit cooperation from other federal agencies that have jurisdiction by law or special expertise on any environmental issue that should be addressed in the EIS being prepared. Where appropriate, the lead agency should seek the cooperation of state or local agencies of similar qualifications. When the proposal may affect an Indian reservation, the agency should consult with the Indian tribe. Section 1508.5. The request for cooperation should come at the earliest possible time in the NEPA process.

After discussions with the candidate cooperating agencies, the lead agency and the cooperating agencies are to determine by letter or by memorandum which agencies will undertake cooperating responsibilities. To the extent possible at this stage, responsibilities for specific issues should be assigned. The allocation of responsibilities will be completed during scoping. Section 1501.7(a)(4).

Cooperating agencies must assume responsibility for the development of information and the preparation of environmental analyses at the request of the lead agency. Section 1501.6(b)(3). Cooperating agencies are now required by Section 1501.6 to devote staff resources that were normally primarily used to critique or comment on the Draft EIS after its preparation, much earlier in the NEPA process—primarily at the scoping and Draft EIS preparation stages. If a cooperating agency determines that its resource limitations preclude any involvement, or the degree of involvement (amount of work) requested by the lead agency, it must so inform the lead agency in writing and submit a copy of this correspondence to the Council. Section 1501.6(c).

In other words, the potential cooperating agency must decide early if it is able to devote any of its resources to a particular proposal. For this reason the regulation states that an agency may reply to a request for cooperation that "other program commitments preclude any involvement or the degree of involvement requested in the *action* that is the subject of the environmental impact statement." (Emphasis added). The regulation refers to the "action," rather than to the EIS, to clarify that the agency is taking itself out of all phases of the federal action, not just draft EIS preparation. This means that the agency has determined that it cannot be involved in the later stages of EIS review and comment, as well as decisionmaking on the proposed action. For this reason, cooperating agencies with jurisdiction by law (those which have permitting or other approval authority) cannot opt out entirely of the duty to cooperate on the EIS. See also Question 15, relating specifically to the responsibility of EPA.

14b. Q. How are disputes resolved between lead and cooperating agencies concerning the scope and level of detail of analysis and the quality of data in impact statements?

A. Such disputes are resolved by the agencies themselves. A lead agency, of course, has the ultimate responsibility for the content of an EIS. But it is supposed to use the environmental analysis and recommendations of cooperating agencies with jurisdiction by law or special expertise to the maximum extent possible, consistent with its own responsibilities as lead agency. Section 1501.6(a)(2).

If the lead agency leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. Similarly, where cooperating agencies have their own decisions to make and they intend to adopt the environmental impact statement and base their decisions on it, one document should include all of the information necessary for the decisions by the cooperating agencies. Otherwise they may be forced to duplicate the EIS process by issuing a new, more complete EIS or Supplemental EIS, even though the original EIS could have sufficed if it had been properly done at the outset. Thus, both lead and cooperating agencies have a stake in producing a document of good quality. Cooperating agencies also have a duty to participate fully in the scoping process to ensure that the appropriate range of issues is determined early in the EIS process.

Because the EIS is not the Record of Decision, but instead constitutes the *information* and *analysis* on which to base a decision, disagreements about conclusions to be drawn from the EIS need not inhibit agencies from issuing a joint document, or adopting another agency's EIS, if the analysis is adequate. Thus, if each agency has its own "preferred alternative," both can be identified in the EIS. Similarly, a cooperating agency with jurisdiction by law may determine in its own ROD that alternative A is the environmentally preferable action, even though the lead agency has decided in its separate ROD that Alternative B is environmentally preferable.

14c. Q. What are the specific responsibilities of federal and state cooperating agencies to review draft EISs?

A. Cooperating agencies (i.e., agencies with jurisdiction by law or special expertise) and agencies that are authorized to develop or enforce environmental standards, must comment on environmental impact statements within their jurisdiction, expertise or authority. Sections 1503.2, 1508.5. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should simply comment accordingly. Conversely, if the cooperating agency determines that a draft EIS is incomplete, inadequate or inaccurate, or it has other comments, it should promptly make such comments, conforming to the requirements of specificity in section 1503.3.

14d. Q. How is the lead agency to treat the comments of another agency with jurisdiction by law or special expertise which has failed or refused to cooperate or participate in scoping or EIS preparation?

A. A lead agency has the responsibility to respond to all substantive comments raising significant issues regarding a draft EIS. Section 1503.4. However, cooperating agencies are generally under an obligation to raise issues or otherwise participate in the EIS process during scoping and EIS preparation if they reasonably can do so. In practical terms, if a cooperating agency fails to cooperate at the outset, such as during scoping, it will find that its comments at a later stage will not be as persuasive to the lead agency.

15. Q. Are EPA's responsibilities to review and comment on the environmental effects of agency proposals under Section 309 of the Clean Air Act independent of its responsibility as a cooperating agency?

A. Yes. EPA has an obligation under Section 309 of the Clean Air Act to review and comment in writing on the environmental impact of any matter relating to the authority of the Administrator contained in proposed legislation, federal construction projects, other federal actions requiring EISs, and new regulations. 42 U.S.C. Sec. 7609. This obligation is independent of its role as a cooperating agency under the NEPA regulations.

16. Q. What is meant by the term "third party contracts" in connection with the preparation of an EIS? Sec Section 1506.5(c). When can "third party contracts" be used?

A. As used by EPA and other agencies, the term "third party contract" refers to the preparation of EISs by contractors paid by the applicant. In the case of an EIS for a National Pollution Discharge Elimination System (NPDES) permit, the applicant, aware in the early planning stages of the proposed project of the need for an EIS, contracts directly with a consulting firm for its preparation. See 40 C.F.R. 6.604(g). The "third party" is EPA which, under Section 1506.5(c), must select the consulting firm, even though the applicant pays for the cost of preparing the EIS. The consulting firm is responsible to EPA for preparing an EIS that meets the requirements of the NEPA regulations and EPA's NEPA procedures. It is in the applicant's interest that the EIS comply with the law so that EPA can take prompt action on the NPDES permit application. The "third party contract" method under EPA's NEPA procedures is purely voluntary, though most applicants have found it helpful in expediting compliance with NEPA.

If a federal agency uses "third party contracting," the applicant may undertake the necessary paperwork for the solicitation of a field of candidates under the agency's direction, so long as the agency complies with Section 1506.5(c). Federal procurement requirements do not apply to the agency because it incurs no obligations or costs under the contract, nor does the agency procure anything under the contract.

17a. Q. If an EIS is prepared with the assistance of a consulting firm, the firm must execute a disclosure statement. What criteria must the firm follow in determining whether it has any "financial or other interest in the outcome of the project" which would cause a conflict of interest?

A. Section 1506.5(c), which specifies that a consulting firm preparing an EIS must execute a disclosure statement, does not define "financial or other interest in the outcome of the project." The Council interprets this term broadly to cover any known benefits other than general enhancement of professional reputation. This includes any financial benefit such as a promise of future construction or design work on the project, as well as indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm's other clients). For example, completion of a highway project may encourage construction of a shopping center or industrial park from which the consultant stands to benefit. If a consulting firm is aware that it has such an interest in the decision on the proposal, it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process.

When a consulting firm has been involved in developing initial data and plans for the project, but does not have any financial or other interest in the outcome of the decision, it need not be disqualified from preparing the EIS. However, a disclosure statement in the draft EIS should clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist.

17b. Q. If the firm in fact has no promise of future work or other interest in the outcome of the proposal, may the firm later bid in competition with others for future work on the project if the proposed action is approved?

A. Yes.

18. Q. How should uncertainties about indirect effects of a proposal be addressed, for example, in cases of disposal of federal lands, when the identity or plans of future landowners is unknown?

A. The EIS must identify all the indirect effects that are known, and make a good faith effort to explain the effects that are not known but are "reasonably foreseeable." Section 1508.8(b). In the example, if there is total uncertainty about the identity of future land owners or the nature of future land uses, then of course, the agency is not required to engage in speculation or contemplation about their future plans. But, in the ordinary course of business, people do make judgments based upon reasonably foreseeable occurrences. It will often be possible to consider the likely purchasers and the development trends in that area or similar areas in recent years; or the likelihood that the land will be used for an energy project, shopping center, subdivision, farm or factory. The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable or potential purchasers have made themselves known. The agency cannot ignore these uncertain, but probable, effects of its decisions.

19a. Q. What is the scope of mitigation measures that must be discussed?

A. The mitigation measures discussed in an EIS must cover the range of impacts of the proposal. The measures must include such things as design alternatives that would decrease pollution emissions, construction impacts, esthetic intrusion, as well as relocation assistance, possible land use controls that could be enacted, and other possible efforts. Mitigation measures must be considered even for impacts that by themselves would not be considered "significant." Once the proposal itself is considered as a whole to have significant effects, all of its specific effects on the environment (whether or not "significant") must be considered, and mitigation measures must be developed where it is feasible to do so. Sections 1502.14(f), 1502.16(h), 1508.14.

19b. Q. How should an EIS treat the subject of available mitigation measures that are (1) outside the jurisdiction of the lead or cooperating agencies, or (2) unlikely to be adopted or enforced by the responsible agency?

A. All relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would not be committed as part of the RODs of these agencies. Sections 1502.16(h), 1505.2(c). This will serve to ert agencies or officials who *can* nplement these extra measures, and ill encourage them to do so. Because e EIS is the most comprehensive nvironmental document, it is an ideal ehicle in which to lay out not only the ll range of environmental impacts but lso the full spectrum of appropriate itigation.

However, to ensure that nvironmental effects of a proposed ction are fairly assessed, the robability of the mitigation measures eing implemented must also be iscussed. Thus the EIS and the Record f Decision should indicate the kelihood that such measures will be dopted or enforced by the responsible gencies. Sections 1502.16(h), 1505.2. If ere is a history of nonenforcement or pposition to such measures, the EIS nd Record of Decision should cknowledge such opposition or onenforcement. If the necessary itigation measures will not be ready or a long period of time, this fact, of ourse, should also be recognized.

20a. Q. When must a worst case nalysis be included in an EIS?

A. If there are gaps in relevant nformation or scientific uncertainty ertaining to an agency's evaluation of ignificant adverse impacts on the uman environment, an agency must nake clear that such information is acking or that the uncertainty exists. An agency must include a worst case nalysis of the potential impacts of the roposal and an indication of the robability or improbability of their ccurence if (a) the information relevant o adverse impacts is essential to a easoned choice among alternatives and he overall costs of obtaining the nformation are exorbitant, or (b) the nformation relevant to adverse impacts s important to the decision and the neans to obtain it are not known.

NEPA requires that impact tatements, at a minimum, contain nformation to alert the public and Congress to all known *possible* nvironmental consequences of agency ction. Thus, one of the federal overnment's most important bligations is to present to the fullest xtent possible the spectrum of consequences that may result from gency decisions, and the details of their otential consequences for the human nvironment.

20b. Q. What is the purpose of a worst case analysis? How is it formulated and what is the scope of the analysis?

A. The purpose of the analysis is to carry out NEPA's mandate for full disclosure to the public of the potential consequences of agency decisions, and to cause agencies to consider those potential consequences when acting on the basis of scientific uncertainties or gaps in available information. The analysis is formulated on the basis of available information, using reasonable projections of the worst possible consequences of a proposed action.

For example, if there are scientific uncertainty and gaps in the available information concerning the numbers of juvenile fish that would be entrained in a cooling water facility, the responsible agency must disclose and consider the possibility of the loss of the commercial or sport fishery.

In addition to an analysis of a low probability/catastrophic impact event, the worst case analysis should also include a spectrum of events of higher probability but less drastic impact.

21. Q. Where an EIS or an EA is combined with another project planning document (sometimes called "piggybacking"), to what degree may the EIS or EA refer to and rely upon information in the project document to satisfy NEPA's requirements?

A. Section 1502.25 of the regulations requires that draft EISs be prepared concurrently and integrated with environmental analyses and related surveys and studies required by other federal statutes. In addition, Section 1506.4 allows any environmental document prepared in compliance with NEPA to be combined with any other agency document to reduce duplication and paperwork. However, these provisions were not intended to authorize the preparation of a short summary or outline EIS, attached to a detailed project report or land use plan containing the required environmental impact data. In such circumstances, the reader would have to refer constantly to the detailed report to understand the environmental impacts and alternatives which should have been found in the EIS itself.

The EIS must stand on its own as an analytical document which fully informs decisionmakers and the public of the environmental effects of the proposal and those of the reasonable alternatives. Section 1502.1. But, as long as the EIS is clearly identified and is self-supporting, it can be physically included in or attached to the project report or land use plan, and may use attached report material as technical backup.

Forest Service environmental impact statements for forest management plans are handled in this manner. The EIS identifies the agency's preferred alternative, which is developed in detail as the proposed management plan. The detailed proposed plan accompanies the EIS through the review process, and the documents are appropriately cross-referenced. The proposed plan is useful for EIS readers as an example, to show how one choice of management options translates into effects on natural resources. This procedure permits initiation of the 90-day public review of proposed forest plans, which is required by the National Forest Management Act.

All the alternatives are discussed in the EIS, which can be read as an independent document. The details of the management plan are not repeated in the EIS, and vice versa. This is a reasonable functional separation of the documents: the EIS contains information relevant to the choice among alternatives; the plan is a detailed description of proposed management activities suitable for use by the land managers. This procedure provides for concurrent compliance with the public review requirements of both NEPA and the National Forest Management Act.

Under some circumstances, a project report or management plan may be totally merged with the EIS, and the one document labeled as both "EIS" and "management plan" or "project report." This may be reasonable where the documents are short, or where the EIS format and the regulations for clear, analytical EISs also satisfy the requirements for a project report.

22. Q. May state and federal agencies serve as joint lead agencies? If so, how do they resolve law, policy and resource conflicts under NEPA and the relevant state environmental policy act? How do they resolve differences in perspective where, for example, national and local needs may differ?

A. Under Section 1501.5(b), federal, state or local agencies, as long as they include at least one federal agency, may act as joint lead agencies to prepare an EIS. Section 1506.2 also strongly urges state and local agencies and the relevant federal agencies to cooperate fully with each other. This should cover joint research and studies, planning activities, public hearings, environmental assessments and the preparation of joint EISs under NEPA and the relevant "little NEPA" state laws, so that one document will satisfy both laws.

The regulations also recognize that certain inconsistencies may exist between the proposed federal action and any approved state or local plan or law. The joint document should discuss the extent to which the federal agency would reconcile its proposed action with such plan or law. Section 1506.2(d). (See Question 23).

Because there may be differences in perspective as well as conflicts among federal, state and local goals for resources management, the Council has advised participating agencies to adopt a flexible, cooperative approach. The joint EIS should reflect all of their interests and missions, clearly identified as such. The final document would then indicate how state and local interests have been accommodated, or would identify conflicts in goals (e.g., how a hydroelectric project, which might induce second home development, would require new land use controls). The EIS must contain a complete discussion of scope and purpose of the proposal, alternatives, and impacts so that the discussion is adequate to meet the needs of local, state and federal decisionmakers.

23a. Q. How should an agency handle potential conflicts between a proposal and the objectives of Federal, state or local land use plans, policies and controls for the area concerned? See Sec. 1502.16(c).

A. The agency should first inquire of other agencies whether there are any potential conflicts. If there would be immediate conflicts, or if conflicts could arise in the future when the plans are finished (see Question 23(b) below), the EIS must acknowledge and describe the extent of those conflicts. If there are any possibilities of resolving the conflicts, these should be explained as well. The EIS should also evaluate the seriousness of the impact of the proposal on the land use plans and policies, and whether, or how much, the proposal will impair the effectiveness of land use control mechanisms for the area. Comments from officials of the affected area should be solicited early and should be carefully acknowleged and answered in the EIS.

23b. Q. What constitutes a "land use plan or policy" for purposes of this discussion?

A. The term "land use plans," includes all types of formally adopted documents for land use planning, zoning and related regulatory requirements. Local general plans are included, even though they are subject to future change. Proposed plans should also be addressed if they have been formally proposed by the appropriate government body in a written form, and are being actively pursued by officials of the jurisdiction. Staged plans, which must go through phases of development such as the Water Resources Council's Level A, B and C planning process should also be included even though they are incomplete.

The term "policies" includes formally adopted statements of land use policy as embodied in laws or regulations. It also includes proposals for action such as the initiation of a planning process, or a formally adopted policy statement of the local, regional or state executive branch, even if it has not yet been formally adopted by the local, regional or state legislative body.

23c. Q. What options are available for the decisionmaker when conflicts with such plans or policies are identified?

A. After identifying any potential land use conflicts, the decisionmaker must weigh the significance of the conflicts, among all the other environmental and non-environmental factors that must be considered in reaching a rational and balanced decision. Unless precluded by other law from causing or contributing to any inconsistency with the land use plans, policies or controls, the decisionmaker retains the authority to go forward with the proposal, despite the potential conflict. In the Record of Decision, the decisionmaker must explain what the decision was, how it was made, and what mitigation measures are being imposed to lessen adverse environmental impacts of the proposal, among the other requirements of Section 1505.2. This provision would require the decisionmaker to explain any decision to override land use plans, policies or controls for the area.

24a. Q. When are EISs required on policies, plans or programs?

A. An EIS must be prepared if an agency proposes to implement a specific policy, to adopt a plan for a group of related actions, or to implement a specific statutory program or executive directive. Section 1508.18. In addition, the adoption of official policy in the form of rules, regulations and interpretations pursuant to the Administrative Procedure Act, treaties, conventions, or other formal documents establishing governmental or agency policy which will substantially alter agency programs, could require an EIS. Section 1508.18. In all cases, the policy, plan, or program must have the potential for significantly affecting the quality of the human environment in order to require an EIS. It should be noted that a proposal "may exist in fact as well as by agency declaration that one exists." Section 1508.23.

24b. Q. When is an area-wide or overview EIS appropriate?

A. The preparation of an area-wide or overview EIS may be particularly useful when similar actions, viewed with other reasonably foreseeable or proposed agency actions, share common timing or geography. For example, when a variety of energy projects may be located in a single watershed, or when a series of new energy technologies may be developed through federal funding, the overview or area-wide EIS would serve as a valuable and necessary analysis of the affected environment and the potential cumulative impacts of the reasonably foreseeable actions under that program or within that geographical area.

24c. Q. What is the function of tiering in such cases?

A. Tiering is a procedure which allows an agency to avoid duplication of paperwork through the incorporation by reference of the general discussions and relevant specific discussions from an environmental impact statement of broader scope into one of lesser scope or vice versa. In the example given in Question 24b, this would mean that an overview EIS would be prepared for all of the energy activities reasonably foreseeable in a particular geographic area or resulting from a particular development program. This impact statement would be followed by site-specific or project-specific EISs. The tiering process would make each EIS of greater use and meaning to the public as the plan or program develops, without duplication of the analysis prepared for the previous impact statement.

25a. Q. When is it appropriate to use appendices instead of including information in the body of an EIS?

A. The body of the EIS should be a succinct statement of all the information on environmental impacts and alternatives that the decisionmaker and the public need, in order to make the decision and to ascertain that every significant factor has been examined. The EIS must explain or summarize methodologies of research and modeling, and the results of research that may have been conducted to analyze impacts and alternatives.

Lengthy technical discussions of modeling methodology, baseline studies, or other work are best reserved for the appendix. In other words, if only technically trained individuals are likely to understand a particular discussion then it should go in the appendix, and a plain language summary of the analysis and conclusions of that technical discussion should go in the text of the EIS.

The final statement must also contain the agency's responses to comments on the draft EIS. These responses will be primarily in the form of changes in the document itself, but specific answers to each significant comment should also be included. These specific responses may be placed in an appendix. If the comments are especially voluminous, summaries of the comments and responses will suffice. (See Question 29 regarding the level of detail required for responses to comments.)

25b. Q. How does an appendix differ rom incorporation by reference?

A. First, if at all possible, the appendix accompanies the EIS, whereas the material which is incorporated by reference does not accompany the EIS. Thus the appendix should contain information that reviewers will be likely to want to examine. The appendix should include material that pertains to preparation of a particular EIS. Research papers directly relevant to the proposal, lists of affected species, discussion of the methodology of models used in the analysis of impacts, extremely detailed responses to comments, or other information, would be placed in the appendix.

The appendix must be complete and available at the time the EIS is filed. Five copies of the appendix must be sent to EPA with five copies of the EIS for filing. If the appendix is too bulky to be circulated, it instead must be placed in conveniently accessible locations or furnished directly to commentors upon request. If it is not circulated with the EIS, the Notice of Availability published by EPA must so state, giving a telephone number to enable potential commentors to locate or request copies of the appendix promptly.

Material that is not directly related to preparation of the EIS should be incorporated by reference. This would include other EISs, research papers in the general literature, technical background papers or other material that someone with technical training could use to evaluate the analysis of the proposal. These must be made available, either by citing the literature, furnishing copies to central locations, or sending copies directly to commentors upon request.

Care must be taken in all cases to ensure that material incorporated by reference, and the occasional appendix that does not accompany the EIS, are in fact available for the full minimum public comment period.

26a. Q. How detailed must an EIS index be?

A. The EIS index should have a level of detail sufficient to focus on areas of the EIS of reasonable interest to any reader. It cannot be restricted to the most important topics. On the other hand, it need not identify every conceivable term or phrase in the EIS. If an agency believes that the reader is reasonably likely to be interested in a topic, it should be included.

26b. Q. Is a keyword index required?

A. No. A keyword index is a relatively short list of descriptive terms that identifies the key concepts or subject areas in a document. For example it could consist of 20 terms which describe the most significant aspects of an EIS that a future researcher would need: type of proposal, type of impacts, type of environment, geographical area, sampling or modelling methodologies used. This technique permits the compilation of EIS data banks, by facilitating quick and inexpensive access to stored materials. While a keyword index is not required by the regulations, it could be a useful addition for several reasons. First, it can be useful as a quick index for reviewers of the EIS, helping to focus on areas of interest. Second, if an agency keeps a listing of the keyword indexes of the EISs it produces, the EIS preparers themselves will have quick access to similar research data and methodologies to aid their future EIS work. Third, a keyword index will be needed to make an EIS available to future researchers using EIS data banks that are being developed. Preparation of such an index now when the document is produced will save a later effort when the data banks become operational.

27a. Q. If a consultant is used in preparing an EIS, must the list of preparers identify members of the consulting firm as well as the agency NEPA staff who were primarily responsible?

A. Section 1502.17 requires identification of the names and qualifications of persons who were primarily responsible for preparing the EIS or significant background papers, including basic components of the statement. This means that members of a consulting firm preparing material that is to become part of the EIS must be identified. The EIS should identify these individuals even though the consultant's contribution may have been modified by the agency.

27b. Q. Should agency staff involved in reviewing and editing the EIS also be included in the list of preparers?

A. Agency personnel who wrote basic components of the EIS or significant background papers must, of course, be identified. The EIS should also list the technical editors who reviewed or edited the statements.

27c. Q. How much information should be included on each person listed?

A. The list of preparers should normally not exceed two pages. Therefore, agencies must determine which individuals had *primary* responsibility and need not identify individuals with minor involvement. The list of preparers should include a very brief identification of the individuals involved, their qualifications (expertise, professional disciplines) and the specific portion of the EIS for which they are responsible. This may be done in tabular form to cut down on length. A line or two for each person's qualifications should be sufficient.

28. Q. May an agency file xerox copies of an EIS with EPA pending the completion of printing the document?

A. Xerox copies of an EIS may be filed with EPA prior to printing only if the xerox copies are simultaneously made available to other agencies and the public. Section 1506.9 of the regulations, which governs EIS filing, specifically requires Federal agencies to file EISs with EPA no earlier than the EIS is distributed to the public. However, this section does not prohibit xeroxing as a form of reproduction and distribution. When an agency chooses xeroxing as the reproduction method, the EIS must be clear and legible to permit ease of reading and ultimate microfiching of the EIS. Where color graphs are important to the EIS, they should be reproduced and circulated with the xeroxed copy.

29a Q. What response must an agency provide to a comment on a draft EIS which states that the EIS's methodology is inadequate or inadequately explained? For example, what level of detail must an agency include in its response to a simple postcard comment making such an allegation?

A. Appropriate responses to comments are described in Section 1503.4. Normally the responses should result in changes in the text of the EIS, not simply a separate answer at the back of the document. But, in addition, the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain briefly why.

An agency is not under an obligation to issue a lengthy reiteration of its methodology for any portion of an EIS if the only comment addressing the methodology is a simple complaint that the EIS methodology is inadequate. But agencies must respond to comments, however brief, which are specific in their criticism of agency methodology. For example, if a commentor on an EIS said that an agency's air quality dispersion analysis or methodology was inadequate, and the agency had included a discussion of that analysis in the EIS, little if anything need be added in response to such a comment. However, if the commentor said that the dispersion analysis was inadequate because of its use of a certain computational technique, or that a dispersion analysis was inadequately explained because computational techniques were not included or referenced, then the agency would have to respond in a substantive and meaningful way to such a comment.

If a number of comments are identical or very similar, agencies may group the comments and prepare a single answer for each group. Comments may be summarized if they are especially voluminous. The comments or summaries must be attached to the EIS regardless of whether the agency believes they merit individual discussion in the body of the final EIS.

29b. Q. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentor on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentor on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered, and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentor points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentor on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

30. Q. When a cooperating agency with jurisdiction by law intends to adopt a lead agency's EIS and it is not satisfied with the adequacy of the document, may the cooperating agency adopt only the part of the EIS with which it is satisfied? If so, would a cooperating agency with jurisdiction by law have to prepare a separate EIS or EIS supplement covering the areas of disagreement with the lead agency?

A. Generally, a cooperating agency may adopt a lead agency's EIS without recirculating it if it concludes that its NEPA requirements and its comments and suggestions have been satisfied. Section 1506.3(a), (c). If necessary, a cooperating agency may adopt only a portion of the lead agency's EIS and may reject that part of the EIS with which it disagrees, stating publicly why it did so. Section 1506.3(a).

A cooperating agency with jurisidiction by law (e.g., an agency with independent legal responsibilities with respect to the proposal) has an independent legal obligation to comply with NEPA. Therefore, if the cooperating agency determines that the EIS is wrong or inadequate, it must prepare a supplement to the EIS, replacing or adding any needed information, and must circulate the supplement as a draft for public and agency review and comment. A final supplemental EIS would be required before the agency could take action. The adopted portions of the lead agency EIS should be circulated with the supplement. Section 1506.3(b). A cooperating agency with jurisdiction by law will have to prepare its own Record of Decision for its action, in which it must explain how it reached its conclusions. Each agency should explain how and why its conclusions differ, if that is the case, from those of other agencies which issued their Records of Decision earlier.

An agency that did not cooperate in preparation of an EIS may also adopt an EIS or portion thereof. But this would arise only in rare instances, because an agency adopting an EIS for use in its own decision normally would have been a cooperating agency. If the proposed action for which the EIS was prepared is substantially the same as the proposed action of the adopting agency, the EIS may be adopted as long as it is recirculated as a final EIS and the agency announces what it is doing. This would be followed by the 30-day review period and issuance of a Record of Decision by the adopting agency. If the proposed action by the adopting agency is not substantially the same as that in ie EIS (i.e., if an EIS on one action is eing adapted for use in a decision on nother action), the EIS would be eated as a draft and circulated for the ormal public comment period and other rocedures. Section 1506.3(b).

31a. Q. Do the Council's NEPA egulations apply to independent egulatory agencies like the Federal Energy Regulatory Commission (FERC) and the Nuclear Regulatory Commission?

A. The statutory requirements of NEPA's Section 102 apply to "all agencies of the federal government." The NEPA regulations implement the procedural provisions of NEPA as set forth in NEPA's Section 102(2) for all agencies of the federal government. The NEPA regulations apply to independent regulatory agencies, however, they do not direct independent regulatory agencies or other agencies to make decisions in any particular way or in a way inconsistent with an agency's statutory charter. Sections 1500.3, 1500.6, 1507.1, and 1507.3.

31b. Q. Can an Executive Branch agency like the Department of the Interior adopt an EIS prepared by an independent regulatory agency such as FERC?

A. If an independent regulatory agency such as FERC has prepared an EIS in connection with its approval of a proposed project, an Executive Branch agency (e.g., the Bureau of Land Management in the Department of the Interior) may, in accordance with Section 1506.3, adopt the EIS or a portion thereof for its use in considering the same proposal. In such a case the EIS must, to the satisfaction of the adopting agency, meet the standards for an adequate statement under the NEPA regulations (including scope and quality of analysis of alternatives) and must satisfy the adopting agency's comments and suggestions. If the independent regulatory agency fails to comply with the NEPA regulations, the cooperating or adopting agency may find that it is unable to adopt the EIS, thus forcing the preparation of a new EIS or EIS Supplement for the same action. The NEPA regulations were made applicable to all federal agencies in order to avoid this result, and to achieve uniform application and efficiency of the NEPA process.

32. Q. Under what circumstances do old EISs have to be supplemented before taking action on a proposal?

A. As a rule of thumb, if the proposal has not yet been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.

If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

33a. Q. When must a referral of an interagency disagreement be made to the Council?

A. The Council's referral procedure is a *pre-decision* referral process for interagency disagreements. Hence, Section 1504.3 requires that a referring agency must deliver its referral to the Council not later than 25 days after publication by EPA of notice that the final EIS is available (unless the lead agency grants an extension of time under Section 1504.3(b)).

33b. Q. May a referral be made after this issuance of a Record of Decision?

A. No, except for cases where agencies provide an internal appeal procedure which permits simultaneous filing of the final EIS and the record of decision (ROD). Section 1506.10(b)(2). Otherwise, as stated above, the process is a pre-decision referral process. Referrals must be made within 25 days after the notice of availability of the final EIS, whereas the final decision (ROD) may not be made or filed until after 30 days from the notice of availability of the EIS. Sections 1504.3(b), 1506.10(b). If a lead agency has granted an extension of time for another agency to take action on a referral, the ROD may not be issued until the extension has expired.

34a. Q. Must Records of Decision (RODs) be made public? How should they be made available?

A. Under the regulations, agencies must prepare a "concise *public* record of decision," which contains the elements specified in Section 1505.2. This public record may be integrated into any other decision record prepared by the agency, or it may be separate if decision documents are not normally made public. The Record of Decision is intended by the Council to be an environmental document (even though it is not explicitly mentioned in the definition of "environmental document" in Section 1508.10). Therefore, it must be made available to the public through appropriate public notice as required by Section 1506.6(b). However, there is no specific requirement for publication of the ROD itself, either in the **Federal Register** or elsewhere.

34b. Q. May the summary section in the final Environmental Impact Statement substitute for or constitute an agency's Record of Decision?

A. No. An environmental impact statement is supposed to inform the decisionmaker before the decision is made. Sections 1502.1, 1505.2. The Council's regulations provide for a 30-day period after notice is published that the final EIS has been filed with EPA before the agency may take final action. During that period, in addition to the agency's own internal final review, the public and other agencies can comment on the final EIS prior to the agency's final action on the proposal. In addition, the Council's regulations make clear that the requirements for the summary in an EIS are not the same as the requirements for a ROD. Sections 1502.12 and 1505.2.

34c. Q. What provisions should Records of Decision contain pertaining to mitigation and monitoring?

A. Lead agencies "shall include appropriate conditions [including mitigation measures and monitoring and enforcement programs] in grants, permits or other approvals" and shall "condition funding of actions on mitigation." Section 1505.3. Any such measures that are adopted must be explained and committed in the ROD.

The reasonable alternative mitigation measures and monitoring programs should have been addressed in the draft and final EIS. The discussion of mitigation and monitoring in a Record of Decision must be more detailed than a general statement that mitigation is being required, but not so detailed as to duplicate discussion of mitigation in the EIS. The Record of Decision should contain a concise summary identification of the mitigation measures which the agency has committed itself to adopt.

The Record of Decision must also state whether all practicable mitigation measures have been adopted, and if not, why not. Section 1505.2(c). The Record of Decision must identify the mitigation measures and monitoring and enforcement programs that have been selected and plainly indicate that they are adopted as part of the agency's decision. If the proposed action is the issuance of a permit or other approval, the specific details of the mitigation measures shall then be included as appropriate conditions in whatever grants, permits, funding or other approvals are being made by the federal agency. Section 1505.3 (a), (b). If the proposal is to be carried out by the federal agency itself, the Record of Decision should delineate the mitigation and monitoring measures in sufficient detail to constitute an enforceable commitment, or incorporate by reference the portions of the EIS that do so.

34d. Q. What is the enforceability of a Record of Decision?

A. Pursuant to generally recognized principles of federal administrative law, agencies will be held accountable for preparing Records of Decision that conform to the decisions actually made and for carrying out the actions set forth in the Records of Decision. This is based on the principle that an agency must comply with its own decisons and regulations once they are adopted. Thus, the terms of a Record of Decision are enforceable by agencies and private parties. A Record of Decision can be used to compel compliance with or execution of the mitigation measures identified therein.

35. Q. How long should the NEPA process take to complete?

A. When an EIS is required, the process obviously will take longer than when an EA is the only document prepared. But the Council's NEPA regulations encourage streamlined review, adoption of deadlines, elimination of duplicative work, eliciting suggested alternatives and other comments early through scoping, cooperation among agencies, and consultation with applicants during project planning. The Council has advised agencies that under the new NEPA regulations even large complex energy projects would require only about 12 months for the completion of the entire EIS process. For most major actions, this period is well within the planning time that is needed in any event, apart from NEPA.

The time required for the preparation of program EISs may be greater. The Council also recognizes that some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS. Indeed, some proposals should be given more time for the thoughtful preparation of an EIS and development of a decision which fulfills NEPA's substantive goals.

For cases in which only an environmental assessment will be prepared, the NEPA process should take no more than 3 months, and in many cases substantially less, as part of the normal analysis and approval process for the action.

36a. Q. How long and detailed must an environmental assessment (EA) be?

A. The environmental assessment is a concise public document which has three defined functions. (1) It briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) it aids an agency's compliance with NEPA when no EIS is necessary, i.e., it helps to identify better alternatives and mitigation measures; and (3) it facilitates preparation of an EIS when one is necessary. Section 1508.9(a).

Since the EA is a concise document, it should not contain long descriptions or detailed data which the agency may have gathered. Rather, it should contain a brief discussion of the need for the proposal, alternatives to the proposal, the environmental impacts of the proposed action and alternatives, and a list of agencies and persons consulted. Section 1508.9(b).

While the regulations do not contain page limits for EA's, the Council has generally advised agencies to keep the length of EAs to not more than approximately 10–15 pages. Some agencies expressly provide page guidelines (e.g., 10–15 pages in the case of the Army Corps). To avoid undue length, the EA may incorporate by reference background data to support its concise discussion of the proposal and relevant issues.

36b. Q. Under what circumstances is a lengthy EA appropriate?

A. Agencies should avoid preparing lengthy EAs except in unusual cases, where a proposal is so complex that a concise document cannot meet the goals of Section 1508.9 *and* where it is extremely difficult to determine whether the proposal could have significant environmental effects. In most cases, however, a lengthy EA indicates that an EIS is needed.

37a. Q. What is the level of detail of information that must be included in a finding of no significant impact (FONSI)?

A. The FONSI is a document in which the agency briefly explains the reasons why an action will not have a significant effect on the human environment and, therefore, why an EIS will not be prepared. Section 1508.13. The finding itself need not be detailed, but must succinctly state the reasons for deciding that the action will have no significant environmental effects, and, if relevant, must show which factors were weighted most heavily in the determination. In addition to this statement, the FONSI must include, summarize, or attach and incorporate by reference, the environmental assessment.

37b. Q. What are the criteria for deciding whether a FONSI should be made available for public review for 30 days before the agency's final determination whether to prepare an EIS?

A. Public review is necessary, for example, (a) if the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (b) if it is an unusual case, a new kind of action, or a precedent setting case such as a first intrusion of even a minor development into a pristine area; (c) when there is either scientific or public controversy over the proposal; or (d) when it involves a proposal which is or is closely similar to one which normally requires preparation of an EIS. Sections 1501.4(e)(2), 1508.27. Agencies also must allow a period of public review of the FONSI if the proposed action would be located in a floodplain or wetland. E.O. 11988, Sec. 2(a)(4); E.O. 11990, Sec. 2(b).

38. Q. Must [EAs] and FONSIs be made public? If so, how should this be done?

A. Yes, they must be available to the public. Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSIs. These are public "environmental documents" under Section 1506.6(b), and, therefore, agencies must give public notice of their availability. A combination of methods may be used to give notice, and the methods should be tailored to the needs of particular cases. Thus, a Federal Register notice of availability of the documents, coupled with notices in national publications and mailed to interested national groups might be appropriate for proposals that are national in scope. Local newspaper notices may be more appropriate for regional or site-specific proposals.

The objective, however, is to notify al interested or affected parties. If this is not being achieved, then the methods should be reevaluated and changed. Repeated failure to reach the interested or affected public would be interpreted as a violation of the regulations.

39. Q. Can an EA and FONSI be used to impose enforceable mitigation measures, monitoring programs, or othe requirements, even though there is no requirement in the regulations in such cases for a formal Record of Decision?

A. Yes. In cases where an environmental assessment is the appropriate environmental document, there still may be mitigation measures o alternatives that would be desirable to consider and adopt even though the impacts of the proposal will not be "significant." In such cases, the EA should include a discussion of these measures or alternatives to "assist agency planning and decisionmaking" and to "aid an agency's compliance with [NEPA] when no environmental impact statement is necessary." Section 1501.3(b), 1508.9(a)(2). The appropriate mitigation measures can be imposed as enforceable permit conditions, or adopted as part of the agency final decision in the same manner mitigation measures are adopted in the formal Record of Decision that is required in EIS cases.

40. Q. If an environmental assessment indicates that the environmental effects of a proposal are significant but that, with mitigation, those effects may be reduced to less than significant levels, may the agency make a finding of no significant impact rather than prepare an EIS? Is that a legitimate function of an EA and scoping?

A. Mitigation measures may be relied upon to make a finding of no significant impact only if they are imposed by statute or regulation, or submitted by an applicant or agency as part of the original proposal. As a general rule, the regulations contemplate that agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement. Sections 1508.8, 1508.27.

If a proposal appears to have adverse effects which would be significant, and certain mitigation measures are then developed during the scoping or EA stages, the existence of such *possible* mitigation does not obviate the need for an EIS. Therefore, if scoping or the EA identifies certain mitigation possibilities without altering the nature of the overall proposal itself, the agency should continue the EIS process and submit the proposal, and the potential mitigation, for public and agency review and comment. This is essential to ensure that the final decision is based on all the relevant factors and that the full NEPA process will result in enforceable mitigation measures through the Record of Decision.

In some instances, where the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation, the agency may then rely on the mitigation measures in determining that the overall effects would not be significant (e.g., where an application for a permit for a small hydro dam is based on a binding commitment to build fish ladders, to permit adequate down stream flow, and to replace any lost wetlands, wildlife habitat and recreational potential). In those instances, agencies should make the FONSI and EA available for 30 days of public comment before taking action. Section 1501.4(e)(2).

Similarly, scoping may result in a redefinition of the entire project, as a result of mitigation proposals. In that case, the agency may alter its previous decision to do an EIS, as long as the agency or applicant resubmits the entire proposal and the EA and FONSI are available for 30 days of review and comment. One example of this would be where the size and location of a proposed industrial park are changed to avoid affecting a nearby wetland area.

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DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 531

[Docket No. LVM 77-05; Notice 5]

Passenger Automobile Average Fuel Economy Standards; Exemption From Average Fuel Economy Standards

AGENCY: National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Final decision to grant exemption from fuel economy standards.

SUMMARY: This notice exempts Excalibur Automobile Corporation (Excalibur) from the generally applicable average fuel economy standards of 19.0 miles per gallon (mpg) and 20.0 mpg for 1979 and 1980 model year passenger automobiles, respectively, and establishes alternative standards. The alternative standards are 11.5 mpg in the 1979 model year and 16.2 mpg in the 1980 model year.

DATES: The exemptions and alternative standards set forth in this notice apply in the 1979 and 1980 model years.

FOR FURTHER INFORMATION CONTACT: Robert Mercure, Office of Automotive Fuel Economy Standards, National Highway Traffic Safety Administration, 400 Seventh Street SW., Washington, D.C. 20590 (202-755-9384).

SUPPLEMENTARY INFORMATION: The National Highway Traffic Safety Administration (NHTSA) is exempting Excalibur from the generally applicable average fuel economy standards for the 1979 and 1980 model year and establishing alternative standards applicable to that company in those model years. This exemption is issued under the authority of section 502(c) of the Motor Vehicle Information and Cost Savings Act, as amended (the Act) (15 U.S.C. 2002(c)). Section 502(c) provides that a manufacturer of passenger automobiles that manufactures fewer than 10,000 passenger automobiles annually may be exempted from the generally applicable average fuel economy standard for a particular model year if that standard is greater than the low volume manufacturer's maximum feasible average fuel economy and if the NHTSA establishes an alternative standard applicable to that manufacturer at the low volume manufacturer's maximum feasible average fuel economy. Section 502(e) of the Act (15 U.S.C. 2002(e)) requires the NHTSA to consider:

(1) Technological feasibility;

(2) Economic practicability;

(3) The effect of other Federal motor vehicle standards on fuel economy; and

(4) The need of the Nation to conserve energy.

This final rule was preceded by a notice announcing the NHTSA's proposed decision to grant an exemption to Excalibur for the 1979 and 1980 model years (45 FR 50840, July 31, 1980). No comments were received during the 45-day comment period.

Based on its conclusions that it is not technologically feasible and economically practicable for Excalibur to improve the fuel economy of its 1979 and 1980 model year automobiles above an average of 11.5 and 16.2 mpg, respectively, that other Federal automobile standards did not affect achievable fuel economy beyond the extent considered in this analysis, and that the national effort to conserve energy will be negligibly affected by the granting of the requested exemptions, this agency concludes that the maximum feasible average fuel economy for Excalibur in the 1979 and 1980 model years is 11.5 mpg and 16.2 mpg, respectively. Therefore, NHTSA is exempting Excalibur from the generally applicable standards and is establishing alternative standards of 11.5 mpg for the 1979 model year and 16.2 mpg for the 1980 model year.

In consideration of the foregoing, 49 CFR Part 531 is amended by revising § 531.5(b)(5) to read as follows:

§ 531.5 Fuel economy standards.

* * * * *

(b) The following manufacturers shall comply with the fuel economy standards indicated below for the specified model years:

* * * * *

(5) Excalibur Automobile Corporation.

AREAS OF EPA RESPONSIBILITY BY LAW OR SPECIAL EXPERTISE

DRAFT

I. Pollution Control

A. Air Pollution

1. Jurisdiction by Law
   - Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 et seq. (40 CFR Parts 51, 52, and 124)
   - Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
   - Approval of State plans for standards of performance for new stationary emissions sources. 42 U.S.C. 7411 (40 CFR Part 60)
   - Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
   - Applications for primary non-ferrous smelter orders. 42 U.S.C. 7419. (40 CFR Part 57)
   - Assuring that grants for construction of sewage treatment works conform with State Implementation Plans. 42 U.S.C. 7616. (40 CFR Part 20)
2. Special Expertise
   - Clean Air Act, as amended. 42 U.S.C. 7401 et seq.
   - Effects of air pollution on public health, welfare and the environment
   - Air pollution control and abatement technologies
   - Ambient air quality standards (40 CFR Part 51)
   - Criteria and Standards for PSD Permits (40 CFR Parts 51, 52 and 124)
   - Protection of visibility (40 CFR Part 51)
   - Ambient air quality monitoring technologies and methods (40 CFR Part 53)
   - Stationary source emission standards (40 CFR Part 60)
   - National emission standards for hazardous air pollutants (40 CFR Part 61)
   - Mobile source emission standards (40 CFR Parts 85-87)

B. Water Pollution

1. Water Quality
   a. Jurisdiction by Law
      - National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
      - NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
      - NPDES permits for discharge of specific pollutants from aquaculture projects. 33 U.S.C. 1328. (40 CFR Parts 122-124)
      - Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
      - RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
      - Underground Injection Contol (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
      - Assistance for construction of publicly owned wastewater treatment works. 33 U.S.C. 1281. (40 CFR Parts 30, and 35)
      - Denial of Federal assistance for any project that the

Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

- b. Special Expertise
    - Federal Water Pollution Control Act, as amended. 33 U.S.C. 1251 et seq.
    - Effects of water pollution on public health welfare, and the environment
    - Water pollution control and abatement technologies
    - NPDES permit technical regulations (40 CFR Parts 125, 129, 133, and 136)
    - Effluent guidelines (40 CFR Parts 400-460)
    - RCRA permit technical regulations (40 CFR Part 146)
    - UIC permit technical regulations (40 CFR Part 146)
    - 404 permit guidelines (40 CFR Part 230)
    - Water Quality Standards (40 CFR Part 120)
    - Drinking Water Standards (40 CFR Parts 141-143)
    - Criteria for State, local, and regional oil removal contingency plans (40 CFR Part 109)
    - Regulations concerning the discharge of oil (40 CFR Part 110)
    - Oil Pollution Prevention (Spill Prevention Control and Countermeasure Plans) (40 CFR Part 112)

2. Pollution of Marine Resources
    - a. Jurisdiction by Law
        * National Pollutant Discharge Elimination System (NPDES) permit for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
        * NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
        * NPDES permits for discharge of specific pollutants from aquaculture projects. 33 U.S.C. 1328. (40 CFR Parts 122-124)
        * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
        * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
        * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
        * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
        * Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Part 225)
    - b. Special Expertise
        - Marine Protection, Research and Sanctuaries Act, as amended. 33 U.S.C. 1401 et seq.
        - Effects of pollution on public health, welfare and the marine environment
        - Criteria for ocean dumping permits (40 CFR Part 227)
        - Criteria for State, local, and regional oil removal contingency plans (40 CFR Part 109)
        - Regulations concerning the discharge of oil (40 CFR Part 110)
        - Oil Pollution Prevention (Spill Prevention Control and Countermeasure Plans) (40 CFR Part 112)

C. Solid Waste

1. Jurisdiction by Law
    - * NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
    - * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
    - * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    - * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
    - * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
    - * Assistance for construction of solid waste disposal facilities. 42 U.S.C. 6948. (40 CFR Parts 30, and 35)
    - * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)
2. Special Expertise
    - ° The Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. 42 U.S.C. 6901 et seq.
    - ° Effects of solid waste on public health, welfare and the environment
    - ° Solid waste disposal technology
    - ° Resource conservation and recovery
    - ° Guidelines for Thermal Processing of Solid Wastes (40 CFR Part 240)
    - ° Guidelines for Land Disposal of Solid Waste (40 CFR Part 241)
    - ° Guidelines for the Collection and Storage of Residential, Commercial, and Institutional Solid Waste (40 CFR Part 243)
    - ° Solid Waste Management Guidelines for Beverage Containers (40 CFR Part 244)
    - ° Guidelines for Resource Recovery Facilities (40 CFR Part 245)
    - ° Guidelines for Source Separation for Materials Recovery (40 CFR Part 246)

D. Noise

1. Jurisdiction by Law
    - none
2. Special Expertise
    - ° Noise Control Act, as amended 42 U.S.C 4901 et seq.
    - ° Effects of noise on the public health, welfare and the environment
    - ° Noise abatement and control technologies
    - ° Noise impact assessment technologies
    - ° Noise emission standards (40 CFR Parts 201-205)

E. Radiation

1. Jurisdiction by Law
    - none
2. Special Expertise
    - ° Standards for the Uranium Fuel Cycle (40 CFR Part 190)
    - ° Standards for Uranium Mill Tailings (40 CFR Part 192)
    - ° Radiation standards for Ocean Disposal (40 CFR Part 227)
    - ° Radiation standards for Drinking Water (40 CFR Part 141)
    - ° Guidance to other Federal agencies for radiation standards. 42 U.S.C. 2021(n).

F. Hazardous Substances
- 1. Toxic Materials
  - a. Jurisdiction by Law
    - * Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
    - * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    - * Orders prohibiting manufacture of toxic chemicals. 15 U.S.C. 2605. (40 CFR Part 750)
  - b. Special Expertise
    - ° Resource Conservation and Recovery Act, as amended. 42 U.S.C. 6901 et seq.
    - ° Toxic Substances Control Act, as amended. 15 U.S.C. 2601 et seq.
    - ° Effects of pollution by toxic materials on public health, welfare and the environment
    - ° Identification and listing of Hazardous Waste (40 CFR Part 261)
    - ° Standards Applicable to Generators of Hazardous Waste (40 CFR Part 262)
    - ° Standards Applicable to Transporters of Hazardous Waste (40 CFR Part 263)
    - ° Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities (40 CFR Parts 264-265)
    - ° Inventory Reporting Regulations for Toxic Substances (40 CFR Part 710)
    - ° Standards for the storage and Disposal of Toxic Waste Material (40 CFR Part 775)
- 2. Food Additives and Contamination of Foodstuffs
  - a. Jurisdiction by Law
    - - none
  - b. Special Expertise
    - ° Federal Food, Drug, and Cosmetic Act, as amended. 21 U.S.C. 346a.
    - ° Tolerances and Exemptions from Tolerances for Pesticides in or on Raw Agricultural Commodities (40 CFR Part 180)
- 3. Pesticides
  - a. Jurisdiction by Law
    - * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    - * Registration of pesticides. 7 U.S.C. 136a. (40 CFR Part 162)
    - * Certification of pesticide users. 7 U.S.C. 136b. (40 CFR Part 171)
    - * Permits for the experimental use of pesticides. 7 U.S.C. 136c. (40 CFR Part 172)
    - * Emergency exemptions for pesticide use granted to Federal or State agencies. 7 U.S.C. 136p. (40 CFR Part 166)
    - * Orders prohibiting manufacture of toxic chemicals. 15 U.S.C. 2605. (40 CFR Part 750)
  - b. Special Expertise
    - ° Federal Insecticide, Fungicide and Rodenticide Act, as amended. 7 U.S.C. 136 et seq.
    - ° Federal Food, Drug and Cosmetic Act, as amended. 21 U.S.C. 346a.
    - ° Effects of Pesticides on Public Health, Welfare, and the environment

- Tolerances and Exemptions from Tolerances for Pesticide Chemicals in or on Raw Agricultural Commodities (40 CFR Part 180)
- Procedures for the Disposal and Storage of Pesticides and Pesticide Containers (40 CFR Part 165)
- Worker Protection Standards for Agricultural Pesticides (40 CFR Part 170)
- Control of non point source pollution

II. Energy

A. Electric Power Development, Generation and Transmission, and Use

1. Jurisdiction by Law
    - Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 et seq. (40 CFR Parts 51, 52, and 124)
    - Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
    - Approval of State plans for standards of performance for new stationar emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
    - Certificaton of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAP). 42 U.S.C. 7412. (40 CFR Part 61)
    - National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
    - RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    - RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    - Underground Injection Control (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
    - NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
    - Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
    - Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
    - Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Part 225)
    - Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

2. Special Expertise
    - pollution control (see Part I)
    - effects of pollution from electric power development, generation, transmission and use on the environment

B. Petroleum Development, Extraction, Refining, Transport, and Use

1. Jurisdiction by Law
    - Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 et seq. (40 CFR Parts 51, 52, and 124)
    - Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)

- * Approval of State plans for standards of performance for new stationary emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
- * Certificaton of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAP). 42 U.S.C. 7412. (40 CFR Part 61)
- * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
- * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344 (40 CFR Parts 122-124)
- * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
- * Underground Injection Control (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
- * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
- * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
- * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
- * Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Part 225)
- * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

2. Special Expertise
   - ° pollution control (see Part I)
   - ° effects of pollution from petroleum development, extraction, refining, transport and use on the environment

C. Natural Gas Development, Production, Transmission, and Use

1. Jurisdiction by Law
   - * Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 _et seq_. (40 CFR Parts 51, 52, and 124)
   - * Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
   - * Approval of State plans for standards of performance for new stationary emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
   - * Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
   - * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
   - * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
   - * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
   - * Underground Injection Control (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
   - * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)

    * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
    * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
    * Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Part 225)
    * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

2. Special Expertise
    ° pollution control (see Part I)
    ° effects of pollution from natural gas development, production, transmission and use on the environment

D. Coal and Minerals Development, Mining Conversion, Processing, Transport and Use

1. Jurisdiction by Law
    * Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 et seq. (40 CFR Parts 51, 52, and 124)
    * Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
    * Approval of State plans for standards of performance for new stationary stationary emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
    * Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
    * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
    * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
    * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    * Underground Injection Control (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
    * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
    * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
    * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
    * Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Part 225)
    * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

2. Special Expertise
    ° pollution control (see Part I)
    ° effects of pollution from coal and minerals development, mining conversion processing, transport and use on the environment

III. Land Use

A. Land Use Changes, Planning and Regulation of Land Development
  1. Jurisdiction by Law
    * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
    * Assistance for construction of publicly owned wastewater treatment works. 33 U.S.C. 1281. (40 CFR Parts 30, and 35)
    * Assistance for construction of solid waste disposal facilities 42 U.S.C. 6948. (40 CFR Parts 30, and 35)
    * Assistance for areawide water quality management planning. 33 U.S.C. 1288. (40 CFR Parts 30, and 35)
    * Assistance to localities to help restore publicly owned lakes. 33 U.S.C. 1324. (40 CFR Parts 30, and 35)
    * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)
  2. Special Expertise
    ° pollution control (see Part I)
    ° effects of pollution from land use changes on the environment
    ° secondary effects of land use changes

B. Public Land Management (including Federal facilities)
  1. Jurisdiction by Law
    * Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 _et seq_. (40 CFR Parts 51, 52, and 124)
    * Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
    * Approval of State plans for standards of performance for new stationary emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
    * Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
    * Assuring that grants for construction of sewage treatment works confor with State Implementation Plans. 42 U.S.C. 7616. (40 CFR Part 20)
    * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
    * NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
    * NPDES permits for discharge of specific pollutants from aquaculture projects. 33 U.S.C. 1328. (40 CFR Parts 122-124)
    * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
    * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    * Underground Injection Control (UIC) permits. 42. U.S.C. 300h. (40 CFR Parts 122-124)
    * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
    * Emergency exemptions for pesticide use granted to Federal or State agencies. 7 U.S.C. 136p. (40 CFR Part 166)

- * Assistance for areawide water quality management planning. 33 U.S.C. 1288. (40 CFR Parts 30, and 35)
- * Assistance to localities to help restore publicly owned lakes. 33 U.S.C. 1324. (40 CFR Parts 30, 35)
- * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

2. Special Expertise
   - ° pollution control (see Part I)
   - ° effects of pollution on public lands
   - ° Federal Facilities compliance with pollution control laws
   - ° pesticide use on Federal lands, including integrated pest management

C. Land Use in Coastal Areas

1. Jurisdiction by Law
   - * Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 et seq. (40 CFR Parts 51, 52, and 124)
   - * Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
   - * Approval of State plans for standards of performance for new stationary emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
   - * Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
   - * Assuring that grants for construction of sewage treatment works conform with State Implementation Plans. 42 U.S.C. 7616. (40 CFR Part 20)
   - * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
   - * NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
   - * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
   - * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
   - * Underground Injection Control (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
   - * Assistance for construction of publicly owned wastewater treatment works. 33 U.S.C. 1281. (40 CFR Parts 30, 35)
   - * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
   - * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
   - * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
   - * Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Parts 225)
   - * Assistance for construction of solid waste disposal facilities 42 U.S.C. 6948. (40 CFR Parts 30, and 35)
   - * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

2. Special Expertise
    ° pollution control (see Part I)
    ° effects of pollution on the coastal environment

D. Protection of Environmentally Critical Areas (Floodplains, Wetlands, Barrier Islands, Beaches and Dunes, Unstable Soils, Steep Slopes, Aquifer Recharge Areas, Tundra, et cetera)

1. Jurisdiction by Law
    * Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 et seq. (40 CFR Parts 51, 52, and 124)
    * Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
    * Approval of State plans for standards of performance for new stationary emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
    * Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
    * Assuring that grants for construction of sewage treatment works conform with State Implementation Plans. 42 U.S.C. 7616. (40 CFR Part 20)
    * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
    * NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
    * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
    * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    * Underground Injection Control (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
    * Assistance for construction of publicly owned wastewater treatment works. 33 U.S.C. 1281. (40 CFR Parts 30, and 35)
    * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
    * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
    * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
    * Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Parts 225)
    * Assistance for construction of solid waste disposal facilities 42 U.S.C. 6948. (40 CFR Parts 30, 35)
    * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

2. Special Expertise
    ° pollution control (see Part I)
    ° effects of pollution on wetlands, floodplains, prime agricultural lands, et cetera

E. Community Development

1. Jurisdiction by Law
    * Assistance for construction of publicly owned wastewater

treatment works. 33 U.S.C. 1281. (40 CFR Parts 30, and 35)
  * Assistance for areawide water quality management planning. 33 U.S.C. 1288. (40 CFR Parts 30 and 35)

2. Special Expertise
   ° pollution control (see Part I)
   ° effects of community development, including secondary impacts on the environment

F. Historic, Architectural and Archeological Preservation
1. Jurisdiction by Law
   - none
2. Special Expertise
   ° Effects of pollution on historic, architectural and archeological resources

G. Outdoor Recreation
1. Jurisdiction by Law
   * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
   * Assistance for construction of publicly owned wastewater treatment works. 33 U.S.C. 1281. (40 CFR Parts 30, and 35)
   * Assistance for areawide water quality management planning. 33 U.S.C. 1324. (40 CFR Parts 30, and 35)
   * Assistance to localities to help restore publicly owned lakes. 33 U.S.C. 1324. (40 CFR Parts 30, and 35)
2. Special Expertise
   ° pollution control (see Part I)
   ° effects of pollution on outdoor recreation areas and opportunities
   ° recreational benefits of clean water

IV. Natural Resource Management

A. Weather Modification
1. Jurisdiction by Law
   - none
2. Special Expertise
   ° pollution control (see Part I)
   ° effects of weather modification on the environment

B. Waterway Regulation and Stream Modification
1. Jurisdiction by Law
   * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
   * NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
   * NPDES permits for discharge of specific pollutants from aquaculture projects. 33 U.S.C. 1328. (40 CFR Parts 122-124)
   * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
2. Special Expertise
   ° pollution control (see Part I)
   ° effects of waterway regulation and stream modification on the environment

C. Soil and Plant Conservation, and Hydrology
  1. Jurisdiction by Law
    * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h03(e). (40 CFR Part 149)
  2. Special Expertise
    ° pollution control (see Part I)
    ° non-point source water pollution control
    ° surface and groundwater systems modelling
    ° effects of pollution on soil and plant conservation, and hydrology

D. Fish and Wildlife
  1. Jurisdiction by Law
    * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
  2. Special Expertise
    ° pollution control (see Part I)
    ° effects of pollution on Fish and Wildlife
    ° 404 permit guidelines (40 CFR Part 230)

E. Renewable Resource Development, Production, Management, Harvest, Transport and Use
  1. Jurisdiction by Law
    * Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 et seq. (40 CFR Parts 51, 52, and 124)
    * Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
    * Approval of State plans for standards of performance for new stationary emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
    * Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
    * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
    * NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
    * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124)
    * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
    * Underground Injection Control (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
    * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
    * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
    * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
    * Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Parts 225)
    * Assistance for construction of solid waste disposal facilities

42 U.S.C. 6948. (40 CFR Parts 30, and 35)

- * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)

2. Special Expertise
   - ° pollution control (see Part I)
   - ° effects of renewable resource development, production, management and use on the environment

F. Non Energy Mineral Resource Conservation, Development, Production, Management, Transport and Use

1. Jurisdiction by Law
   - * Prevention of significant air quality deterioration (PSD Permits). 42 U.S.C. 7470 et seq. (40 CFR Parts 51, 52, and 124)
   - * Approval of State Implementation Plans (SIPs) for national primary and secondary ambient air quality standards. 42 U.S.C. 7410. (40 CFR Parts 51 and 52)
   - * Approval of State plans for standards of performance for new stationary emission sources. 42 U.S.C. 7411. (40 CFR Part 60)
   - * Certification of new emission sources for conformance with National Emission Standards for Hazardous Air Pollutants (NESHAPs). 42 U.S.C. 7412. (40 CFR Part 61)
   - * National Pollutant Discharge Elimination System (NPDES) permits for discharge of pollutants into the waters of the United States. 33 U.S.C. 1342. (40 CFR Parts 122-124)
   - * NPDES permits for the disposal of sewage sludge. 33 U.S.C. 1345. (40 CFR 122-124)
   - * Review of permits for the discharge of dredged or fill materials into the waters of the United States. 33 U.S.C. 1344. (40 CFR Parts 122-124
   - * RCRA permits for hazardous waste treatment, storage, and disposal facilities. 42 U.S.C. 6925. (40 CFR Parts 122-124)
   - * Underground Injection Control (UIC) permits. 42 U.S.C. 300h. (40 CFR Parts 122-124)
   - * NPDES permits for ocean discharges. 33 U.S.C. 1343. (40 CFR Parts 122-124)
   - * Permits for ocean dumping. 33 U.S.C. 1412, 1414, 1418. (40 CFR Parts 220-224)
   - * Permits for transportation of materials (other than dredged material) for the purposes of dumping into ocean waters. 42 U.S.C. 1412, 1414. (40 CFR Parts 220-224)
   - * Review of permits for transportation of dredged material for purposes of dumping into ocean waters. 33 U.S.C. 1413. (40 CFR Parts 225)
   - * Assistance for construction of solid waste disposal facilities 42 U.S.C. 6948 (40 CFR Parts 30, and 35)
   - * Denial of Federal assistance for any project that the Administrator determines may contaminate a designated sole source aquifer. 42 U.S.C. 300h-3(e). (40 CFR Part 149)
2. Special Expertise
   - ° pollution control (see Part I)
   - ° effects of non-energy mineral resource conservation, development, production, management, transport, and use on the environment

G. Natural Resource Conservation

1. Jurisdiction by Law
   - none
2. Special Expertise

- pollution control (see Part I)
- effects of resource conservation on the environment
- resource recovery from wastes
- solid waste management guidelines for beverage containers (40 CFR Part 244)
- Resource recovery facilities guidelines (40 CFR Part 245)
- Guidelines for source separation materials recovery (40 CFR Part 246)

CEQ

SCOPING GUIDANCE

I. Introduction

A. Background of this document.

In 1978, with the publication of the proposed NEPA regulations (since adopted as formal rules, 40 C.F.R. Parts 1500-1508)*, the Council on Environmental Quality gave formal recognition to an increasingly used term — scoping. Scoping is an idea that has long been familiar to those involved in NEPA compliance: In order to manage effectively the preparation of an environmental impact statement (EIS), one must determine the scope of the document — that is, what will be covered, and in what detail. Planning of this kind was a normal component of EIS preparation. But the consideration of issues and choice of alternatives to be examined was in too many cases completed outside of public view. The innovative approach to scoping in the regulations is that the process is open to the public and state and local governments, as well as to affected federal agencies. This open process gives rise to important new opportunities for better and more efficient NEPA analyses, and simultaneously places new responsibilities on public and agency participants alike to surface their concerns early. Scoping helps insure that real problems are identified early and properly studied; that issues that are of no concern do not consume time and effort; that the draft statement when first made public is balanced and thorough; and that the delays occasioned by re-doing an inadequate draft are avoided. Scoping does not create problems that did not already exist; it ensures that problems that would have been raised anyway are identified early in the process.

Many members of the public as well as agency staffs engaged in the NEPA process have told the Council that the open scoping requirement is one of the most far-reaching changes engendered by the NEPA regulations. They have predicted that scoping could have a profound positive effect on environmental analyses, on the impact statement process itself, and ultimately on decisionmaking.

Because the concept of open scoping was new, the Council decided to encourage agencies' innovation without unduly restrictive guidance. Thus the regulations relating to scoping are very simple. They state that "there shall be an early and open process for determining the scope of issues to be addressed" which "shall be termed scoping," but they lay down few specific requirements. (Section 1501.7*). They require an open process with public notice; identification of significant and insignificant issues; allocation of EIS preparation assignments; identification of related analysis requirements in order to avoid duplication of work; and the planning of a schedule for EIS preparation that meshes with the agency's decisionmaking schedule. (Section 1501.7(a)). The regulations encourage, but do not require, setting time limits and page limits for the EIS, and holding scoping meetings. (Section 1501.7(b)). Aside from these general outlines, the regulations left the agencies on their own. The Council did not believe, and still does not, that it is necessary or appropriate to dictate the specific manner in which over 100 federal agencies should deal with the public. However, the Council has received several requests for more guidance. In 1980 we decided to investigate the agency and public response to the scoping requirement, to find out what was working and what was not, and to share this with all agencies and the public.

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* All citations are to the NEPA regulations, 40 C.F.R. Parts 1500-1508 unless otherwise specified.

The Council first conducted its own survey, asking federal agencies to report some of their scoping experiences. The Council then contracted with the American Arbitration Association and Clark McGlennon Associates to survey the scoping techniques of major agencies and to study several innovative methods in detail.* Council staff conducted a two-day workshop in Atlanta in June 1980, to discuss with federal agency NEPA staff and several EIS contractors what seems to work best in scoping of different types of proposals, and discussed scoping with federal, state and local officials in meetings in all 10 federal regions.

This document is a distillation of all the work that has been done so far by many people to identify valuable scoping techniques. It is offered as a guide to encourage success and to help avoid pitfalls. Since scoping methods are still evolving, the Council welcomes any comments on this guide, and may add to it or revise it in coming years.

B. What scoping is and what it can do.

Scoping is often the first contact between proponents of a proposal and the public. This fact is the source of the power of scoping and of the trepidation that it sometimes evokes. If a scoping meeting is held, people on both sides of an issue will be in the same room and, if all goes well, will speak to each other. The possibilities that flow from this situation are vast. Therefore, a large portion of this document is devoted to the productive management of meetings and the de-fusing of possible heated disagreements.

Even if a meeting is not held, the scoping process leads EIS preparers to think about the proposal early on, in order to explain it to the public and affected agencies. The participants respond with their own concerns about significant issues and suggestions of alternatives. Thus as the draft EIS is prepared, it will include, from the beginning, a reflection or at least an acknowledgement of the cooperating agencies' and the public's concerns. This reduces the need for changes after the draft is finished, because it reduces the chances of overlooking a significant issue or reasonable alternative. It also in many cases increases public confidence in NEPA and thedecisionmaking process, thereby reducing delays, such as from litigation, later on when implementing the decisions. As we will discuss further in this document, the public generally responds positively when its views are taken seriously, even if they cannot be wholly accomodated.

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* The results of this examination are reported in "Scoping the Content of EISs: An Evaluation of Agencies' Experiences," which is available from the Council or the Resource Planning Analysis Office of the U.S. Geological Survey, 750 National Center, Reston, Va. 22092.

But scoping is not simply another "public relations" meeting requirement. It has specific and fairly limited objectives: (a) to identify the affected public and agency concerns; (b) to facilitate an efficient EIS preparation process, through assembling the cooperating agencies, assigning EIS writing tasks, ascertaining all the related permits and reviews that must be scheduled concurrently, and setting time or page limits; (c) to define the issues and alternatives that will be examined in detail in the EIS while simultaneously devoting less attention and time to issues which cause no concern; and (d) to save time in the overall process by helping to ensure that draft statements adequately address relevant issues, reducing the possibility that new comments will cause a statement to be rewritten or supplemented.

Sometimes the scoping process enables early identification of a few serious problems with a proposal, which can be changed or solved because the proposal is still being developed. In these cases, scoping the EIS can actually lead to the solution of a conflict over the proposed action itself. We have found that this extra benefit of scoping occurs fairly frequently. But it cannot be expected in most cases, and scoping can still be considered successful when conflicts are clarified but not solved. This guide does not presume that resolution of conflicts over proposals is a principal goal of scoping, because it is only possible in limited circumstances. Instead, the Council views the principal goal of scoping to be an adequate and efficiently prepared EIS. Our suggestions and recommendations are aimed at reducing the conflicts among affected interests that impede this limited objective. But we are aware of the possibilities of more general conflict resolution that are inherent in any productive discussions among interested parties. We urge all participants in scoping processes to be alert to this larger context, in which scoping could prove to be the first step in environmental problem-solving.

Scoping can lay a firm foundation for the rest of the decisionmaking process. If the EIS can be relied upon to include all the necessary information for formulating policies and making rational choices, the agency will be better able to make a sound and prompt decision. In addition, if it is clear that all reasonable alternatives are being seriously considered, the public will usually be more satisfied with the choice among them.

II. Advice for Government Agencies Conducting Scoping

A. General context.

Scoping is a process, not an event or a meeting. It continues throughout the planning for an EIS, and may involve a series of meetings, telephone conversations, or written comments from different interested groups. Because it is a process, participants must remain flexible. The scope of an EIS occasionally may need to be modified later if a new issue surfaces, no matter how thorough the scoping was. But it makes sense to try to set the scope of the statement as early as possible.

Scoping may identify people who already have knowledge about a site or an alternative proposal or a relevant study, and induce them to make it available. This can save a lot of research time and money. But people will not come forward unless they believe their views and materials will receive serious consideration. Thus scoping is a crucial first step toward building public confidence in a fair environmental analysis and ultimately a fair decisionmaking process.

One further point to remember: the lead agency cannot shed its responsibility to assess each significant impact or alternative even if one is found after scoping. But anyone who hangs back and fails to raise something that reasonably could have been raised earlier on will have a hard time prevailing during later stages of the NEPA process or if litigation ensues. Thus a thorough scoping process does provide some protection against subsequent lawsuits.

B. Step-by-step through the process.

1. Start scoping after you have enough information.

Scoping cannot be useful until the agency knows enough about the proposed action to identify most of the affected parties, and to present a coherent proposal and a suggested initial list of environmental issues and alternatives. Until that time there is no way to explain to the public or other agencies what you want them to get involved in. So the first stage is to gather preliminary information from the applicant, or to compose a clear picture of your proposal, if it is being developed by the agency.

2. Prepare an information packet.

In many cases, scoping of the EIS has been preceded by preparation of an environmental assessment (EA) as the basis for the decision to proceed with an EIS. In such cases, the EA will, of course, include the preliminary information that is needed.

If you have not prepared an EA, you should put together a brief information packet consisting of a description of the proposal, an initial list of impacts and alternatives, maps, drawings, and any other material or references that can help the interested public to understand what is being proposed. The proposed work plan of the EIS is not usually sufficient for this purpose. Such documents rarely contain a description of the goals of the proposal to enable readers to develop alternatives.

At this stage, the purpose of the information is to enable participants to make an intelligent contribution to scoping the EIS. Because they will be helping to plan what will be examined during the environmental review, they need to know where you are now in that planning process.

Include in the packet a brief explanation of what scoping is, and what procedure will be used, to give potential participants a context for their involvement. Be sure to point out that you want comments from participants on very specific matters. Also reiterate that no decision has yet been made on the contents of the EIS, much less on the proposal itself. Thus, explain that you do not yet have a preferred alternative, but that you may identify the preferred alternative in the draft EIS. (See Section 1502.14(e)). This should reduce the tendency of participants to perceive the proposal as already a definite plan. Encourage them to focus on recommendations for improvements to the various alternatives.

Some of the complaints alleging that scoping can be a waste of time stem from the fact that the participants may not know what the proposal is until they arrive at a meeting. Even the most intelligent among us can rarely make useful, substantive comments on the spur of the moment. Don't expect helpful suggestions to result if participants are put in such a position.

3. Design the scoping process for each project.

There is no established or required procedure for scoping. The process can be carried out by meetings, telephone conversations, written comments, or a combination of all three. It is important to tailor the type, the timing and the location of public and agency comments to the proposal at hand.

For example, a proposal to adopt a land management plan for a National Forest in a sparsely populated region may not lend itself to calling a single meeting in a central location. While people living in the area and elsewhere may be interested, any meeting place will be inconvenient for most of the potential participants. One solution is to distribute the information packet, solicit written comments, list a telephone number with the name of the scoping coordinator, and invite comments to be phoned in. Otherwise, small meetings in several locations may be necessary when face-to-face communication is important.

In another case, a site-specific construction project may be proposed. This would be a better candidate for a central scoping meeting. But you must first find out if anyone would be interested in attending such a meeting. If you simply assume that a meeting is necessary, you may hire a hall and a stenographer, assemble your staff for a meeting, and find that nobody shows up. There are many proposals that just do not generate sufficient public interest to cause people to attend another public meeting. So a wise early step is to contact known local citizens groups and civic leaders.

In addition, you may suggest in your initial scoping notice and information packet that all those who desire a meeting should call to request one. That way you will only hear from those who are seriously interested in attending.

The question of where to hold a meeting is a difficult one in many cases. Except for site specific construction projects, it may be unclear where the interested parties can be found. For example, an EIS on a major energy development program may involve policy issues and alternatives to the program that are of interest to public groups all over the nation, and to agencies headquartered in Washington, D.C., while the physical impacts might be expected to be felt most strongly in a particular region of the country. In such a case, if personal contact is desired, several meetings would be necessary, especially in the affected region and in Washington, to enable all interests to be heard.

As a general guide, unless a proposal has no site specific impacts, scoping meetings should not be confined to Washington. Agencies should try to elicit the views of people who are closer to the affected regions.

The key is to be flexible. It may not be possible to plan the whole scoping process at the outset, unless you know who all the potential players are. You can start with written comments, move on to an informal meeting, and hold further meetings if desired.

There are several reasons to hold a scoping meeting. First, some of the best effects of scoping stem from the fact that all parties have the opportunity to meet one another and to listen to the concerns of the others. There is no satisfactory substitute for personal contact to achieve this result. If there is any possibility that resolution of underlying conflicts over a proposal may be achieved, this is always enhanced by the development of personal and working relationships among the parties.

Second, even in a conflict situation people usually respond positively when they are treated as partners in the project review process. If they feel confident that their views were actually heard and taken seriously, they will be more likely to be satisfied that the decisionmaking process was fair even if they disagree with the outcome. It is much easier to show people that you are listening to them if you hold a face-to-face meeting where they can see you writing down their points, than if their only contact is through written comments.

If you suspect that a particular proposal could benefit from a meeting with the affected public at any time during its review, the best time to have the meeting is during this early scoping stage. The fact that you are willing to discuss openly a proposal before you have committed substantial resources to it will often enhance the chances for reaching an accord.

If you decide that a public meeting is appropriate, you still must decide what type of meeting, or how many meetings, to hold. We will discuss meetings in detail below in "Conducting a Public Meeting." But as part of designing the scoping process, you must decide between a single meeting and multiple ones for different interest groups, and whether to hold a separate meeting for government agency participants.

The single large public meeting brings together all the interested parties, which has both advantages and disadvantages. If the meeting is efficiently run, you can cover a lot of interests and issues in a short time. And a single meeting does reduce agency travel time and expense. In some cases it may be an advantage to have all interest groups hear each others' concerns, possibly promoting compromise. It is definitely important to have the staffs of the cooperating agencies, as well as the lead agency, hear the public views of what the significant issues are; and it will be difficult and expensive for the cooperating agencies to attend several meetings. But if there are opposing groups of citizens who feel strongly on both sides of an issue, the setting of the large meeting may needlessly create tension and an emotional confrontation between the groups. Moreover, some people may feel intimidated in such a setting, and won't express themselves at all.

The principal drawback of the large meeting, however, is that it is generally unwieldy. To keep order, discussion is limited, dialogue is difficult, and often all participants are frustrated, agency and public alike. Large meetings can serve to identify the interest groups for future discussion, but often little else is accomplished. Large meetings often become "events" where grandstanding substitutes for substantive comments. Many agencies resort to a formal hearing-type format to maintain control, and this can cause resentments among participants who come to the meeting expecting a responsive discussion.

For these reasons, we recommend that meetings be kept small and informal, and that you hold several, if necessary, to accomodate the different interest groups. The other solution is to break a large gathering into small discussion groups, which is discussed below. Using either method increases the likelihood that participants will level with you and communicate their underlying concerns rather than make an emotional statement just for effect.

Moreover, in our experience, a separate meeting for cooperating agencies is quite productive. Working relationships can be forged for the effective participation of all involved in the preparation of the EIS. Work assignments are made by the lead agency, a schedule may be set for production of parts of the draft EIS, and information gaps can be identified early. But a productive meeting such as this is not possible at the very beginning of the process. It can only result from the same sort of planning and preparation that goes into the public meetings. We discuss below the special problems of cooperating agencies, and their information needs for effective participation in scoping.

4. Issuing the public notice.

The preliminary look at the proposal, in which you develop the information packet discussed above, will enable you to tell what kind of public notice will be most appropriate and effective.

Section 1501.7 of the NEPA regulations requires that a notice of intent to prepare an EIS must be published in the Federal Register prior to initiating scoping.* This means that one of the appropriate means of giving public notice of the upcoming scoping process could be the same Federal Register notice. And because the notice of intent must be published anyway, the scoping notice would be essentially free. But use of the Federal Register is not an absolute requirement, and other means of public notice often are more effective, including local newspapers, radio and TV, posting notices in public places, etc. (See Section 1506.6 of the regulations.)

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* Several agencies have found it useful to conduct scoping for environmental assessments. EAs are prepared where answering the question of whether an EIS is necessary requires identification of significant environmental issues; and consideration of alternatives in an EA can often be useful even where an EIS is not necessary. In both situations scoping can be valuable. Thus the Council has stated that scoping may be used in connection with preparation of an EA, that is, before publishing any notice of intent to prepare an EIS. As in normal scoping, appropriate public notice is required, as well as adequate information on the proposal to make scoping worthwhile. But scoping at this early stage cannot substitute for the normal scoping process unless the earlier public notice stated clearly that this would be the case, and the notice of intent expressly provides that written comments suggesting impacts and alternatives for study will still be considered.

What is important is that the notice actually reach the affected public. If the proposal is an important new national policy in which national environmental groups can be expected to be interested, these groups can be contacted by form letter with ease. (See the Conservation Directory for a list of national groups.**) Similarly, for proposals that may have major implications for the business community, trade associations can be helpful means of alerting affected groups. The Federal Register notice can be relied upon to notify others that you did not know about. But the Federal Register is of little use for reaching individuals or local groups interested in a site specific proposal. Therefore notices in local papers, letters to local government officials and personal contact with a few known interested individuals would be more appropriate. Land owners abutting any proposed project site should be notified individually.

Remember that issuing press releases to newspapers, and radio and TV stations is not enough, because they may not be used by the media unless the proposal is considered "newsworthy." If the proposal is controversial, you can try alerting reporters or editors to an upcoming scoping meeting for coverage in special weekend sections used by many papers. But placing a notice in the legal notices section of the paper is the only guarantee that it will be published.

5. Conducting a public meeting.

In our study of agency practice in conducting scoping, the most interesting information on what works and doesn't work involves the conduct of meetings. Innovative techniques have been developed, and experience shows that these can be successful.

One of the most important factors turns out to be the training and experience of the moderator. The U.S. Office of Personnel Management and others give training courses on how to run a meeting effectively. Specific techniques are taught to keep the meeting on course and to deal with confrontations. These techniques are sometimes called "meeting facilitation skills."

When holding a meeting, the principle thing to remember about scoping is that it is a process to initiate preparation of an EIS. It is not concerned with the ultimate decision on the proposal. A fruitful scoping process leads to an adequate environmental analysis, including all reasonable

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** The Conservation Directory is a publication of the National Wildlife Federation, 1421 16th St., N.W., Washington, D.C. 20036, $4.00.

alternatives and mitigation measures. This limited goal is in the interest of all the participants, and thus offers the possibility of agreement by the parties on this much at least. To run a successful meeting you must keep the focus on this positive purpose.

At the point of scoping therefore, in one sense all the parties involved have a common goal, which is a thorough environmental review. If you emphasize this in the meeting you can stop any grandstanding speeches without a heavy hand, by simply asking the speaker if he or she has any concrete suggestions for the group on issues to be covered in the EIS. By frequently drawing the meeting back to this central purpose of scoping, the opponents of a proposal will see that you have not already made a decision, and they will be forced to deal with the real issues. In addition, when people see that you are genuinely seeking their opinion, some will volunteer useful information about a particular subject or site that they may know better than anyone on your staff.

As we stated above, we found that informal meetings in small groups are the most satisfactory for eliciting useful issues and information. Small groups can be formed in two ways: you can invite different interest groups to different meetings, or you can break a large number into small groups for discussion.

One successful model is used by the Army Corps of Engineers, among others. In cases where a public meeting is desired, it is publicized and scheduled for a location that will be convenient for as many potential participants as possible. The information packet is made available in several ways, by sending it to those known to be interested, giving a telephone number in the public notices for use in requesting one, and providing more at the door of the meeting place as well. As participants enter the door, each is given a number. Participants are asked to register their name, address and/or telephone number for use in future contact during scoping and the rest of the NEPA process.

The first part of the meeting is devoted to a discussion of the proposal in general, covering its purpose, proposed location, design, and any other aspects that can be presented in a lecture format. A question and answer period concerning this information is often held at this time. Then if there are more than 15 or 20 attendees at the meeting, the next step is to break it into small groups for more intensive discussion. At this point, the numbers held by the participants are used to assign them to small groups by sequence, random drawing, or any other method. Each group should be no larger than 12, and 8-10 is better. The groups are informed that their task is to prepare a list of significant environmental issues and reasonable alternatives for analysis in the EIS. These lists will be presented to the main group and combined into a master list, after the discussion groups are finished. The rules for how priorities are to be assigned to the issues identified by each group should be made clear before the large group breaks up.

Some agencies ask each group member to vote for the 5 or 10 most important issues. After tallying the votes of individual members, each group would only report out those issues that received a certain number of votes. In this way only those items of most concern to the members would even make the list compiled by each group. Some agencies go further, and only let each group report out the top few issues identified. But you must be careful not to ignore issues that may be considered a medium priority by many people. They may still be important, even if not in the top rank. Thus instead of simply voting, the members of the groups should rank the listed issues in order of perceived importance. Points may be assigned to each item on the basis of the rankings by each member, so that the group can compile a list of its issues in priority order. Each group should then be asked to assign cut-off numbers to separate high, medium and low priority items. Each group should then report out to the main meeting all of its issues, but with priorities clearly assigned.

One member of the lead agency or cooperating agency staff should join each group to answer questions and to listen to the participants' expressions of concern. It has been the experience of many of those who have tried this method that it is better not to have the agency person lead the group discussions. There does need to be a leader, who should be chosen by the group members. In this way, the agency staff member will not be perceived as forcing his opinions on the others.

If the agency has a sufficient staff of formally trained "meeting facilitators," they may be able to achieve the same result even where agency staff people lead the discussion groups. But absent such training, the staff should not lead the discussion groups. A good technique is to have the agency person serve as the recording secretary for the group, writing down each impact and alternative that is suggested for study by the participants. This enhances the neutral status of the agency representative, and ensures that he is perceived as listening and reacting to the views of the group. Frequently, the recording of issues is done with a large pad mounted on the wall like a blackboard, which has been well received by agency and public alike, because all can see that the views expressed actually have been heard and understood.

When the issues are listed, each must be clarified or combined with others to eliminate duplication or fuzzy concepts. The agency staff person can actually lead in this effort because of his need to reflect on paper exactly what the issues are. After the group has listed all the environmental impacts and alternatives and any other issues that the members wish to have considered, they are asked to discuss the relative merits and importance of each listed item. The group should be reminded that one of its tasks is to eliminate insignificant issues. Following this, the members assign priorities or vote using one of the methods described above.

The discussion groups are then to return to the large meeting to report on the results of their ranking. At this point further discussion may be useful to seek a concensus on which issues are really insignificant. But the moderator must not appear to be ruthlessly eliminating issues that the participants ranked of high or medium importance. The best that can usually be achieved is to "deemphasize" some of them, by placing them in the low priority category.

6. What to do with the comments.

After you have comments from the cooperating agencies and the interested public, you must evaluate them and make judgments about which issues are in

7. Allocating work assignments and setting schedules.

Following the public participation in whatever form, and the selection of issues to be covered, the lead agency must allocate the EIS preparation work among the available resources. If there are no cooperating agencies, the lead agency allocates work among its own personnel or contractors. If there are cooperating agencies involved, they may be assigned specific research or writing tasks. The NEPA regulations require that they normally devote their own resources to the issues in which they have special expertise or jurisdiction by law. (Sections 1501.6(b)(3), (5), and 1501.7(a)(4)).

In all cases, the lead agency should set a schedule for completion of the work, designate a project manager and assign the reviewers, and must set a time limit for the entire NEPA analysis if requested to do so by an applicant. (Section 1501.8).

8. A few ideas to try.

a. Route design workshop

As part of a scoping process, a successful innovation by one agency involved route selection for a railroad. The agency invited representatives of the interested groups (identified at a previous public meeting) to try their hand at designing alternative routes for a proposed rail segment. Agency staff explained design constraints and evaluation criteria such as the desire to minimize damage to prime agricultural land and valuable wildlife habitat. The participants were divided into small groups for a few hours of intensive work. After learning of the real constraints on alternative routes, the participants had a better understanding of the agency's and applicant's viewpoints. Two of the participants actually supported alternative routes that affected their own land because the overall impacts of these routes appeared less adverse.

The participants were asked to rank the five alternatives they had devised and the top two were included in the EIS. But the agency did not permit the groups to apply the same evaluation criteria to the routes proposed by the applicant or the agency. Thus public confidence in the process was not as high as it could have been, and probably was reduced when the applicant's proposal was ultimately selected.

The Council recommends that when a hands-on design workshop is used, the assignment of the group be expanded to include evaluation of the reasonableness of all the suggested alternatives.

b. Hotline

Several agencies have successfully used a special telephone number, essentially a hotline, to take public comments before, after, or instead of a public meeting. It helps to designate a named staff member to receive these calls so that some continuity and personal relationships can be developed.

fact significant and which ones are not. The decision of what the EIS should contain is ultimately made by the lead agency. But you will now know what the interested participants consider to be the principal areas for study and analysis. You should be guided by these concerns, or be prepared to briefly explain why you do not agree. Every issue that is raised as a priority matter during scoping should be addressed in some manner in the EIS, either by in-depth analysis, or at least a short explanation showing that the issue was examined, but not considered significant for one or more reasons.

Some agencies have complained that the time savings claimed for scoping have not been realized because after public groups raise numerous minor matters, they cannot focus the EIS on the significant issues. It is true that it is always easier to add issues than it is to subtract them during scoping. And you should realize that trying to eliminate a particular environmental impact or alternative from study may arouse the suspicions of some people. Cooperating agencies may be even more reluctant to eliminate issues in their areas of special expertise than the public participants. But the way to approach it is to seek concensus on which issues are less important. These issues may then be deemphasized in the EIS by a brief discussion of why they were not examined in depth.

If no concensus can be reached, it is still your responsibility to select the significant issues. The lead agency cannot abdicate its role and simply defer to the public. Thus a group of participants at a scoping meeting should not be able to "vote" an insignificant matter into a big issue. If a certain issue is raised and in your professional judgment you believe it is not significant, explain clearly and briefly in the EIS why it is not significant. There is no need to devote time and pages to it in the EIS if you can show that it is not relevant or important to the proposed action. But you should address in some manner all matters that were raised in the scoping process, either by an extended analysis or a brief explanation showing that you acknowledge the concern.

Several agencies have made a practice of sending out a post-scoping document to make public the decisions that have been made on what issues to cover in the EIS. This is not a requirement, but in certain controversial cases it can be worthwhile. Especially when scoping has been conducted by written comments, and there has been no face-to-face contact, a post-scoping document is the only assurance to the participants that they were heard and understood until the draft EIS comes out. Agencies have acknowledged to us that "letters instead of meetings seem to get disregarded easier." Thus a reasonable quid pro quo for relying on comment letters would be to send out a post-scoping document as feedback to the commentors.

The post-scoping document may be as brief as a list of impacts and alternatives selected for analysis; it may consist of the "scope of work" produced by the lead and cooperating agencies for their own EIS work or for the contractor; or it may be a special document that describes all the issues and explains why they were selected.

c. Videotape of sites

A videotape of proposed sites is an excellent tool for explaining site differences and limitations during the lecture-format part of a scoping meeting.

d. Videotape meetings

One agency has videotaped whole scoping meetings. Staff found that the participants took their roles more seriously and the taping appeared not to precipitate grandstanding tactics.

e. Review committee

Success has been reported from one agency which sets up review committees, representing all interested groups, to oversee the scoping process. The committees help to design the scoping process. In cooperation with the lead agency, the committee reviews the materials generated by the scoping meeting. Again, however, the final decision on EIS content is the responsibility of the lead agency.

f. Consultant as meeting moderator

In some hotly contested cases, several agencies have used the EIS consultant to actually run the scoping meeting. This is permitted under the NEPA regulations and can be useful to de-fuse a tense atmosphere if the consultant is perceived as a neutral third party. But the responsible agency officials must attend the meetings. There is no substitute for developing a relationship between the agency officials and the affected parties. Moreover, if the responsible officials are not prominently present, the public may interpret that to mean that the consultant is actually making the decisions about the EIS, and not the lead agency.

g. Money saving tips

Remember that money can be saved by using conference calls instead of meetings, tape-recording the meetings instead of hiring a stenographer, and finding out whether people want a meeting before announcing it.

C. Pitfalls.

We list here some of the problems that have been experienced in certain scoping cases, in order to enable others to avoid the same difficulties.

1. Closed meetings.

In response to informal advice from CEQ that holding separate meetings for agencies and the public would be permitted under the regulations and could be more productive, one agency scheduled a scoping meeting for the cooperating agencies some weeks in advance of the public meeting. Apparently, the lead agency felt that the views of the cooperating agencies would be more candidly expressed if the meeting were closed. In any event, several members of the public learned of the meeting and asked to be present. The lead agency acquiesced only after newspaper reporters were able to make a story out of the closed session. At the meeting, the members of the public were informed that they would not be allowed to speak, nor to record the proceedings. The ill feeling aroused by this chain of events may not be repaired for a long time. Instead, we would suggest the following possibilities:

a. Although separate meetings for agencies and public groups may be more efficient, there is no magic to them. By all means, if someone insists on attending the agency meeting, let him. There is nothing as secret going on there as he may think there is if you refuse him admittance. Better yet, have your meeting of cooperating agencies after the public meeting. That may be the most logical time anyway, since only then can the scope of the EIS be decided upon and assignments made among the agencies. If it is well done, the public meeting will satisfy most people and show them that you are listening to them.

b. Always permit recording. In fact, you should suggest it for public meetings. All parties will feel better if there is a record of the proceeding. There is no need for a stenographer, and tape is inexpensive. It may even be better then a typed transcript, because staff and decision-makers who did not attend the meeting can listen to the exchange and may learn a lot about public perceptions of the proposal.

c. When people are admitted to a meeting, it makes no sense to refuse their requests to speak. However, you can legitimately limit their statements to the subject at hand—scoping. You do not have to permit some participants to waste the others' time if they refuse to focus on the impacts and alternatives for inclusion in the EIS. Having a tape of the proceedings could be useful after the meeting if there is some question that speakers were improperly silenced. But it takes an experienced moderator to handle a situation like this.

d. The scoping stage is the time for building confidence and trust on all sides of a proposal, because this is the only time when there is a common enterprise. The attitudes formed at this stage can carry through the project review process. Certainly it is difficult for things to get better. So foster the good will as long as you can by listening to what is being said during scoping. It is possible that out of that dialogue may appear recommendations for changes and mitigation measures that can turn a controversial fight into an acceptable proposal.

2. Contacting interested groups.

Some problems have arisen in scoping where agencies failed to contact all the affected parties, such as industries or state and local governments. In one case, a panel was assembled to represent various interests in scoping an EIS on a wildlife-related program. The agency had an excellent format for the meeting, but the panel did not represent industries that would be affected by the program or interested state and local governments. As a result, the EIS may fail to reflect the issues of concern to these parties.

Another agency reported to us that it failed to contact parties directly because staff feared that if they missed someone they would be accused of favoritism. Thus they relied on the issuance of press releases which were not effective. Many people who did not learn about the meetings in time sought additional meeting opportunities, which cost extra money and delayed the process.

In our experience, the attempt to reach people is worth the effort. Even if you miss someone, it will be clear that you tried. You can enlist a few representatives of an interest group to help you identify and contact others. Trade associations, chambers of commerce, local civic groups, and local and national conservation groups can spread the word to members.

3. Tiering.

Many people are not familiar with the way environmental impact statements can be "tiered" under the NEPA regulations, so that issues are examined in detail at the stage that decisions on them are being made. See Section 1508.28 of the regulations. For example, if a proposed program is under review, it is possible that site specific actions are not yet proposed. In such a case, these actions are not addressed in the EIS on the program, but are reserved for a later tier of analysis. If tiering is being used, this concept must be made clear at the outset of any scoping meeting, so that participants do not concentrate on issues that are not going to be addressed at this time. If you can specify when these other issues will be addressed it will be easier to convince people to focus on the matters at hand.

4. Scoping for unusual programs.

One interesting scoping case involved proposed changes in the Endangered Species Program. Among the impacts to be examined were the effects of this conservation program on user activities such as mining, hunting, and timber harvest, instead of the other way around. Because of this reverse twist in the impacts to be analyzed, some participants had difficulty focusing on useful issues. Apparently, if the subject of the EIS is unusual, it will be even harder than normal for scoping participants to grasp what is expected of them.

In the case of the Endangered Species Program EIS, the agency planned an intensive 3 day scoping session, successfully involved the participants, and reached accord on several issues that would be important for the future implementation of the program. But the participants were unable to focus on impacts and program alternatives for the EIS. We suggest that if the intensive session had been broken up into 2 or 3 meetings separated by days or weeks, the participants might have been able to get used to the new way of thinking required, and thereby to participate more productively. Programmatic proposals are often harder to deal with in a scoping context than site specific projects. Thus extra care should be taken in explaining the goals of the proposal and in making the information available well in advance of any meetings.

D. Lead and Cooperating Agencies.

Some problems with scoping revolve around the relationship between lead and cooperating agencies. Some agencies are still uncomfortable with these roles. The NEPA regulations, and the 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18026, (March 23, 1981) describe in detail the way agencies are now asked to cooperate on environmental analyses. (See Questions 9, 14, and 30.) We will focus here on the early phase of that cooperation.

It is important for the lead agency to be as specific as possible with the cooperating agencies. Tell them what you want them to contribute during scoping: environmental impacts and alternatives. Some agencies still do not understand the purpose of scoping.

Be sure to contact and involve representatives of the cooperating agencies who are responsible for NEPA-related functions. The lead agency will need to contact staff of the cooperating agencies who can both help to identify issues and alternatives and commit resources to a study, agree to a schedule for EIS preparation, or approve a list of issues as sufficient. In some agencies that will be at the district or state office level (e.g., Corps of Engineers, Bureau of Land Management, and Soil Conservation Service) for all but exceptional cases. In other agencies you must go to regional offices for scoping comments and commitments (e.g., EPA, Fish and Wildlife Service, Water and Power Resources Service). In still others, the field offices do not have NEPA responsibilities or expertise and you will deal directly with headquarters (e.g., Federal Energy Regulatory Commission, Interstate Commerce Commission). In all cases you are looking for the office that can give you the answers you need. So keep trying until you find the organizational level of the cooperating agency that can give you useful information and that has the authority to make commitments.

As stated in 40 Questions and Answers about the NEPA Regulations, the lead agency has the ultimate responsibility for the content of the EIS, but if it leaves out a significant issue or ignores the advice and expertise of the cooperating agency, the EIS may be found later to be inadequate. (46 Fed. Reg. 18030, Question 14b.) At the same time, the cooperating agency will be concerned that the EIS contain material sufficient to satisfy its decisionmaking needs. Thus, both agencies have a stake in producing a document of good quality. The cooperating agencies should be encouraged not only to participate in scoping but also to review the decisions made by the lead agency about what to include in the EIS. Lead agencies should allow any information needed by a cooperating agency to be included, and any issues of concern to the cooperating agency should be covered, but it usually will have to be at the expense of the cooperating agency.

Cooperating agencies have at least as great a need as the general public for advance information on a proposal before any scoping takes place. Agencies have reported to us that information from the lead agency is often too sketchy or comes too late for informed participation. Lead agencies must clearly explain to all cooperating agencies what the proposed action is conceived to be at this time, and what present alternatives and issues the lead agency sees, before expecting other agencies to devote time and money to a scoping session. Informal contacts among the agencies before scoping gets underway are valuable to establish what the cooperating agencies will need for productive scoping to take place.

Some agencies will be called upon to be cooperators more frequently than others, and they may lack the resources to respond to the numerous requests. The NEPA regulations permit agencies without jurisdiction by law (i.e., no approval authority over the proposal) to decline the cooperating agency role. (Section 1501.6(c)). But agencies that do have jurisdiction by law cannot opt out entirely and may have to reduce their cooperating effort devoted to each EIS. (See Section 1501.6(c) and 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18030, Question 14a.) Thus, cooperators would be greatly aided by a priority list from the lead agency showing which proposals most need their help. This will lead to a more efficient allocation of resources.

Some cooperating agencies are still holding back at the scoping stage in order to retain a critical position for later in the process. They either avoid the scoping sessions or fail to contribute, and then raise objections in comments on the draft EIS. We cannot emphasize enough that the whole point of scoping is to avoid this situation. As we stated in 40 Questions and Answers about the NEPA Regulations, "if the new alternative [or other issue] was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the [lead] agency." (46 Fed. Reg. 18035, Question 29b.)

III. Advice for Public Participants

Scoping is a new opportunity for you to enter the earliest phase of the decisionmaking process on proposals that affect you. Through this process you have access to public officials before decisions are made and the right to explain your objections and concerns. But this opportunity carries with it a new responsibility. No longer may individuals hang back until the process is almost complete and then spring forth with a significant issue or alternative that might have been raised earlier. You are now part of the review process, and your role is to inform the responsible agencies of the potential impacts that should be studied, the problems a proposal may cause that you foresee, and the alternatives and mitigating measures that offer promise.

As noted above, and in 40 Questions and Answers, no longer will a comment raised for the first time after the draft EIS is finished be accorded the same serious consideration it would otherwise have merited if the issue had been raised during scoping. Thus you have a responsibility to come forward early with known issues.

In return, you get the chance to meet the responsible officials and to make the case for your alternative before they are committed to a course of action. To a surprising degree this avenue has been found to yield satisfactory results. There's no guarantee, of course, but when the alternative you suggest is really better, it is often hard for a decisionmaker to resist.

There are several problems that commonly arise that public participants should be aware of:

A. Public input is often only negative

The optimal timing of scoping within the NEPA process is difficult to judge. On the one hand, as explained above (Section II.B.1.), if it is attempted too early, the agency cannot explain what it has in mind and informed participation will be impossible. On the other, if it is delayed, the public may find that significant decisions are already made, and their comments may be discounted or will be too late to change the project. Some agencies have found themselves in a tactical cross-fire when public criticism arises before they can even define their proposal sufficiently to see whether they have a worthwhile plan. Understandably, they would be reluctant after such an experience to invite public criticism early in the planning process through open scoping. But it is in your interest to encourage agencies to come out with proposals in the early stage because that enhances the possibility of your comments being used. Thus public participants in scoping should reduce the emotion level wherever possible and use the opportunity to make thoughtful, rational presentations on impacts and alternatives. Polarizing over issues too early hurts all parties. If agencies get positive and useful public responses from the scoping process, they will more frequently come forward with proposals early enough so that they can be materially improved by your suggestions.

B. Issues are too broad

The issues that participants tend to identify during scoping are much too broad to be useful for analytical purposes. For example, "cultural impacts" — what does this mean? What precisely are the impacts that should be examined? When the EIS preparers encounter a comment as vague as this they will have to make their own judgment about what you meant, and you may find that your issues are not covered. Thus, you should refine the broad general topics, and specify which issues need evaluation and analysis.

C. Impacts are not identified

Similarly, people (including agency staff) frequently identify "causes" as issues but fail to identify the principal "effects" that the EIS should evaluate in depth. For example, oil and gas development is a cause of many impacts. Simply listing this generic category is of little help. You must go beyond the obvious causes to the specific effects that are of concern. If you want scoping to be seen as more than just another public meeting, you will need to put in extra work.

IV. Brief Points For Applicants.

Scoping can be an invaluable part of your early project planning. Your main interest is in getting a proposal through the review process. This interest is best advanced by finding out early where the problems with the proposal are, who the affected parties are, and where accomodations can be made. Scoping is an ideal meeting place for all the interest groups if you have not already contacted them. In several cases, we found that the compromises made at this stage allowed a project to move efficiently through the permitting process virtually unopposed.

The NEPA regulations place an affirmative obligation on agencies to "provide for cases where actions are planned by private applicants" so that designated staff are available to consult with the applicants, to advise applicants of information that will be required during review, and to insure that the NEPA process commences at the earliest possible time. (Section 1501.2(d)). This section of the regulations is intended to ensure that environmental factors are considered at an early stage in the applicant's planning process. (See 40 Questions and Answers about the NEPA Regulations, 46 Fed. Reg. 18028, Questions 8 and 9.)

Applicants should take advantage of this requirement in the regulations by approaching the agencies early to consult on alternatives, mitigation requirements, and the agency's information needs. This early contact with the agency can facilitate a prompt initiation of the scoping process in cases where an EIS will be prepared. You will need to furnish sufficient information about your proposal to enable the lead agency to formulate a coherent presentation for cooperating agencies and the public. But don't wait until your choices are all made and the alternatives have been eliminated. (Section 1506.1).

During scoping, be sure to attend any of the public meetings unless the agency is dividing groups by interest affiliation. You will be able to answer any questions about the proposal, and even more important, you will be able to hear the objections raised, and find out what the real concerns of the public are. This is, of course, vital information for future negotiations with the affected parties.

PARTICIPANTS OF EIS CONFERENCE OCTOBER 22-23, 1981

U. S. DEPARTMENT OF AGRICULTURE

Forest Service

Chris Glover
U. S. Forest Service
1720 Peachtree St., N.W. COMM. 404/881-2242
Atlanta, Georgia 30367 FTS. 257-2242

Jean Paul Kruglewicz
U. S. Forest Service
1720 Peachtree St., N. W. 404/881-2242
Atlanta, Georgia 30367 257-2242

William R. Phelps
U. S. Forest Service
1720 Peachtree Street, N. W. 404/881-2242
Atlanta, Georgia 30367 257-2242

Robert Spivey
U. S. Forest Service
1720 Peachtree Street, N. W. 404/881-2242
Atlanta, Georgia 30367 257-2242

Robert Williams
U. S. Forest Service
1720 Peachtree St., N. W. 404/881-2242
Atlanta, Georgia 30367 257-2242

Soil Conservation Service

Stewart Calvert
SCS
333 Waller Avenue 404/233-2750
Lexington, Kentucky 355-2750

M. E. Cribbs
SCS, Suite 1321
100 West Capital Street 601/969-4335
Jackson, Mississippi 490-4335

W. Mason Dollar
SCS
138 South Gay Street COMM. 205/821-8070
Auburn, Alabama FTS. 534-4574

Max R. Goodman
SCS
P. O. Box 661 601/534-4251
New Albany, Mississippi 40504

Allan Heard
SCS
333 Waller Avenue 606/233-2747
Lexington, Kentucky 355-2747

J. Torbit Henry
SCS
138 S. Gay Street 205/821-8070
Auburn, Alabama 534-4574

W. T. Holmes
SCS
P.O. Box 1160 601/455-2750
Greenwood, Mississippi 38930

Ottie Johnson
SCS
P. O. BOX 1208 904/377-8732
Gainsville, Florida 32602 946-7201

Fred Keeter
SCS
Suite 1321
100 West Capitol Street 601/969-4335
Jackson, Mississippi 490-4335

Danny K. Nelson
SCS
P. O. Box 1208 904/377-8732
Gainesville, Florida 32602 946-7201

Bobby Reeves
SCS
138 S. Gay Street 205/821-8070
Auburn, Alabama 534-4574

Dr. Marc Safley
SCS
P. O. Box 2890 202/447-9529
Washington, D. C. 20013 447-9529

Stephen A. Sewell
SCS
675 U. S. Courthouse COMM. 615/251-5873
Nashville, Tennessee FTS. 852-5873

N. E. Shuler
SCS
1835 Assembly St., Rm. 950 803/765-5681
Columbia, South Carolina 677-5681

Ray Swicegood
SCS 404/546-2116
Athens, GA 30601 250-2116

Gary L. Tyre
SCS
P. O. Box 832 404/546-2114
Athens, Georgia 250-2114

U. S. DEPARTMENT OF INTERIOR

James H. Lee
Regional Environmental Officer
U. S. Department of Interior
Room 1412,
Richard Russell Federal Building 404/221-4524
Atlanta, Georgia 30303 242-4524

Fish and Wildlife Service

Ken Butts
Fish and Wildlife Service
75 Spring Street S. W. 404/221-3548
Atlanta, Georgia 30303 242-3548

Dennis Chase
Fish and Wildlife Service
75 Spring Street, S. W. 404/221-6343
Atlanta, Georgia 30303 242-6343

Steve Gilbert
Fish and Wildlife Service
P. O. Box 12559 803/724-4707
Charleston, South Carolina 677-4704

Joe Hardy
Fish and Wildlife Service
75 Spring Street, S. W. 404/221-3580
Atlanta, Georgia 30303 242-3580

Harold Wahlquist
Fish and Wildlife Service
75 Spring Street, S. W. 404/221-3580
Atlanta, Georgia 30303 242-3580

Bureau of Land Management

Mary R. Bartz
Bureau of Land Management
Room 841, 500 Camp Street 504/589-6541
New orleans, Louisiana 70130 682-6541

Jack Holt
Bureau of Land Management
500 Camp Street 504/589-6541
New Orleans, Louisiana 70130 682-6541

Jake Lehman
Bureau of Land Management 504/589-6541
New Orleans, Louisiana 70130 682-6541

National Park Service

William Appel
Recreation Services Branch
75 Spring Street, S. W. 404/221-2618
Atlanta, Georgia 30303 242-2618

Wallace Brittain
National Park Service
75 Spring Street, S. W. 404/221-5838
Atlanta, Georgia 30303 242-5838

Michael Duwe
National Park Service
75 Spring Street., S. W. 404-221-2619
Atlanta, Georgia 30303 242-2619

Wallace H. Jones
National Park Service
75 Spring Street, S. W. 404/221-2611
Atlanta, Georgia 30303 242-2611

Sharon King
National Park Service
75 Spring Street, S. W. 404/221-2611
Atlanta, Georgia 30303 242-2611

William T. Springer
National Park Service
75 Spring Street, S. W. 404/221-5835
Atlanta, Georgia 30303 242-5835

Fred Van Vonro
National Park Service
75 Spring Street, S. W. 404/221-2611
Atlanta, Georgia 30303 242-2611

Sarah H. Zimny
National Park Service
75 Spring Street, S. W. 404/221-5838
Atlanta, Georgia 30303 242-5838

DEPARTMENT OF DEFENSE

U. S. Army Corps of Engineers (Civil Works)

South Atlantic Division

Mary Anne Cooper
Corps of Engineers, South Atlantic Div.
Title Building, 30 Pryor Street 404/221-4580
Atlanta, GA 30303 242-4580

Ard L. Eulenteld
Corps of Engineers, South Atlantic Div.
Title Building, 30 Pryor Street 404/221-4580
Atlanta, Georgia 30303 242-4580

L. C. Fowler
Corps of Engineers, Savannah District
P. O. Box 889 912/944-5834
Savannah, Georgia 234-5834

Lt. Col. Walter L. Heme
Corps of Engineers, Savannah District
P. O. Box 889 912/944-5224
Savannah, Georgia 248-5224

Richard Jackson
Corps of Engineers, Wilmington District
P. O. Box 1890 919/343-4745
Wilmington, North Carolina 28402 671-4745

Marc Rucker
Corps of Engineers, South Atlantic Div.
Title Building, 30 Pryor Street 404/221-6043
Atlanta, Georgia 30303 242-6043

John Rushing
Corps of Engineers, South Atlantic Div.
Title Building, 30 Pryor Street 404/221-4580
Atlanta, Georgia 30303 242-4580

Jim Stirling
Corps of Engineers, South Atlantic Div.
Title Building
30 Pryor Street COMM. 404/221-6754
Atlanta, Georgia 30303 FTS. 242-6754

George Strain
Corps of Engineers, South Atlantic Div.
Title Building, 30 Pryor Street 404/221-4580
Atlanta, Georgia 30303 242-4580

David J. Wahus
Corps of Engineers, Savannah District
P. O. Box 889 912/944-5224
Savannah, Georgia 31402 248-5224

Colonel Hugh West
Corps of Engineers, South Atlantic Division
Title building, 30 Pryor Street 404/221-4580
Atlanta, Georgia 30303 242-4580

Office, Chief of Engineers

Richard L. Makinen
Corps of Engineers, Office, Chief of Engineers
20 Mass. Avenue, N. W. 202/272-0120
Washington, D. C. 20314 272-0120

Lance D. Wood
Corps of Engineers, Office, Chief of Engineers
20 Mass. Avenue, N. W. 202/272-0120
Washington, D. C. 20314 272-0120

Lower Mississippi Valley Division

Eugene G. Buglewicz
Corps of Engineers
P. O. Box 80 601/634-5856
Vicksburg, Mississippi 39180 542-5856

Andrew Grosso
Corps of Engineers
668 Clifford Davis Federal Bldg. 901/521-3857
Memphis, Tennessee 38703 222-3857

Morris Mauney
Corps of Engineers, Memphis District
668 Clifford Davis Federal Bldg. 901/521-3857
Memphis, Tennessee 38103 222-3857

Terry Rodery
Corps of Engineers, Memphis District
668 Clifford Davis Federal Building 901/521-3857
Memphis, Tennessee 38103 222-3857

Rob Roghman
Corps of Engineers, Memphis District
668 Clifford Davis Federal Building 901/521-3857
Memphis, Tennessee 38103 222-3857

Mike Strachn
Corps of Engineers, Vicksburg District
P. O. Box 60 601/636-5429
Vicksburg, Misissippi 542-5429

John Weber
Corps of Engineers, New Orleans District
P. O. Box 60267 504/838-2516
New Orleans, Louisiana 70160 687-2516

North Atlantic Division

Terry Getchell
Corps of Engineers
803 Front Street 804/441-3657
Norfolk, Virginia 23510 827-3657

Bob Hume
Corps of Engineers
803 Front Street 804/441-3657
Norfolk, Virginia 23510 827-3657

Ohio River Division

Ed Goodno
Corps of Engineers
P. O. Box 2127 304/529-5712
Huntington, West Virginia 25721 924-5712

Jeremiah Parsons
Corps of Engineers
P. O. Box 1159 513/684-3077
Cincinnati, Ohio 684-3077

Robert Woodyard
Corps of Engineers,
Louisville District
P. O. Box 59 502/582-5696
Louisville, Kentucky 40201 352-5696

Roderick A. Chisholm
Corps of Engineers
San Francisco, California

U. S. Army

Julian A. Brown
U. S. Army - Fort McPherson
AFZK-EH-C, Building 358 COMM. 404/752-3702
Fort McPherson, Georgia 30330

Ray Clark
USAMPS & CS Training Center COMM. 205/238-3019
Fort McClellan, Alabama FTS. 229-1000

John J. Fittipaldi
U. S. Army-Const. Eng. Research Lab
P. O. Box 4005 217/352-6511
Champaign, Illinois 61820 958-7354

Jim Fletcher
U. S. Army
3246 Teton Drive 404/752-2195
Atlanta, Georgia

Timothy M. Mullen
U. S. Army Infantry Center
DFE-Env. Management Office 404/545-4766
Fort Benning, Georgia

Thomas E. Newkirk
U. S. Army Training & Doctrine Command 804/727-3300
Fort Monroe, Virginia 23651 931-3335

Luke Owen
U. S. AMPS & CS Training Center 205/238-3019
Fort McClellan, Alabama 229-1000

J. B. Parker
Director of Facility Engineers
U. S. Army 919/396-8207
Fort Bragg, North Carolina 28307

Robert G. Reyns
DFE Environmental Office 803/751-4911
Fort Jackson, South Carolina 29207

U. S. Air Force

Winfred G. Dodson Air Force Regional Civil Engineers Eastern Region Title Building 30 Pryor Street Atlanta, Georgia 30303	COMM. 404-221-6776 FTS. 242-6776
Gary L. Jacks U. S. Air Force AFESC/DEV Tyndall AFB, Florida	904/283-6192
Captain Peter F. Jaskilka Air Force Engineering and Services Center Tyndall AFB, Florida 32403	904/283-6191
W. Allen Nixon U. S. Air Force HQ AFESC/DEV Tyndall AFB, Florida	904/283-6163

U. S. Marine Corps

Rebecca A. Herbig MCAS Cherry Pt., Building 414, Stop 1 Cherry Point, North Carolina 28560	919/466-3631
David Vann Marshburn Marine Corps Base Camp LeJeune, North Carolina	914/451-1833
Danny Sharpe Base Maintenance Division U. S. Marine Corps Camp LeJeune, North Carolina	919/451-5003

U. S. Navy

George Cameron Barcus Naval Training Equipment Center Orlando, Florida 32813	646-4426
Laurens M. Pitts Naval Facilities Engineering Command P. O. Box 10068 Charleston, South Carolina 29411	803/743-5510 679-5510
LCDR E. C. Rushing, Jr. Officer in Charge of Construction TRIDENT NSSB Kings Bay, Georgia 31547	912/673-2303

Bo Thompson
U. S. Navy
Orlando, Florida

John C. Wilkins
Naval Facilities Engineering Command
P. O. Box 10068
Charleston, South Carolina COMM. 803/743-5510
FTS. 679-5510

U. S. DEPARTMENT OF TRANSPORTATION

U. S. Coast Guard

Marvin Barnes
U. S. Coast Guard
Portsmouth, Virginia 804/398-9276
827-9276

Lt. James J. Lober, Jr.
Commander, Eighth Coast Guard District
500 Camp Street
New Orleans, Louisiana 70458 504/589-2961
682-2961

Eric J. Wolfe
U. S. Coast Guard
51 S. W. 1st Avenue
Miami, Florida 33130 305/350-5502
350-5502

Federal Aviation Administration

T. M. Ackerman
FAA
3400 Norman Berry Dr.
East Point, Georgia 30320 404/763-7756
246-7756

Rick Faber
FAA
P. O. Box 20636
Atlanta, Georgia 30320 404/763-7756
246-7756

Jeff Griffith
FAA
P. O. Box 20636
Atlanta, Georgia 30320 404/763-7756
246-7756

Thomas J. Hoffman
FAA
P. O. Box 20636
Atlanta, Georgia 30320 404/763-7756
246-7756

Robert H. Johnson
FAA
P. O. Box 20636 404/763-7756
Atlanta, Georgia 30320 246-7756

Harold E. Little
FAA
1568 Willingtan Dr. 404/763-7756
College Park, Georgia 246-7639

Melvin L. Mitchell
FAA
P. O. Box 20636 404/763-7756
Atlanta, Georgia 30320 246-7756

Emily Trapnell
FAA
P. O. Box 20636 404/763-7756
Atlanta, Georgia 246-7756

R. T. Smith
FAA
P. O. 20636 404/763-7756
Atlanta, Georgia 246-7756

Travis Watson
FAA
3400 Norman Berry Drive 404/763-7756
East Point, Georgia 30320 246-7756

Arthur K. Weathers
FAA
3400 Norman Berry Drive 404/763-7756
East Point, Georgia 30320 246-7756

Otis T. Welch
FAA- Airports District Office
3973 Knight Arnold Road., Suite 103 901/521-3495
Memphis, Tennessee 38118 222-3495

Federal Highway Administration

Eugene W. Cleckley
Associate Regional Administrator
for Planning and Development
1720 Peachtree Road, N. W. , Suite 200 404/881-4997
Atlanta, Georgia 30367 257-4997

Dave Densmore
Federal Highway Administration
1422 W. Peachtree St., N. W. 404/881-4758
Atlanta, Georgia 257-4758

Dwight A. Horne
Federal Highway Administration
1422 W. Peachtree St., N. W.
Atlanta, Georgia
404/881-4758
257-4758

Joseph Huerta
Federal Highway Administration
1422 W. Peachtree St., N. W.
Atlanta, Georgia
404/881-4758
257-4758

George Osborne
Federal Highway Administration
1720 Peachtree Street
Atlanta, Georgia
404/881-4067
257-4067

Walter Lee Reynolds
Federal Highway Administration
1422 W. Peachtree Street, Suite 700
Atlanta, Georgia
404/881-4658
257-4658

Urban Mass Transportation

Jody B. Sloan
Urban Mass Transportation
1720 Peachtree Street, Suite 400
Atlanta, Georgia 30309
404/881-7875
257-7875

STATE HIGHWAY DEPARTMENTS

Alabama

Bill Carwile
Alabama Highway Department
11 S. Union Street
Montgomery, Alabama 36130
203/832-5593

Florida

C. L. Irwin
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida
904/487-1435

Georgia

Ronald R. Brown
Georgia Department of Transportation
65 Aviation Circle
Atlanta, Georgia
404/696-4634

Toni D. Gardner
Georgia Department of Transportation
65 Aviation Circle COMM. 404/696-4634
Atlanta, Georgia 30336

Peter Malphurs
Georgia Department of Transportation
65 Aviation Circle 404/696-4634
Atlanta, Georgia 30336

James S. Schell
Georgia Department of Transportation
65 Aviation Circle 404/696-4634
Atlanta, Georgia 30336

Paul Skemke
Georgia Department of Transportation
65 Aviation Circle 404/696-4634
Atlanta, Georgia 30336

Al Tate
Georgia Department of Transportation
65 Aviation Circle 404/696-4634
Atlanta, Georgia 30336

Ellen Whitlock
Georgia Department of Transportaion
65 Aviation Circle 404/696-4634
Atlanta, Georgia 30336

Mississippi

W. K. Magee
Mississippi State Highway Department
P. O. Box 1850 601/354-7355
Jackson, Mississippi 39205

Tennessee

Ben L. Smith
Tennessee Department of Transportation
Suite 900, Polk Building 615/741-3653
Nashville, Tennessee 37219

NUCLEAR RGULATORY COMMISSION

Ronald L. Ballard
U. S. Nuclear Regulatory Commission
(Mail AR 5200)
Washington, D.C. 20555 492-4818

TENNESSEE VALLEY AUTHORITY

Dennis M. McCarthy
Tennessee Valley Authority
224 Natural Resources Building COMM. 615/632-6450
Norris, Tennessee 37828 FTS. 856-6430

DEPARTMENT OF ENERGY

Vicki L. Alspaugh
U. S. Department of Energy
Chicago Operations Office
9800 South Cass Avenue 312/972-2244
Argonne, Illinois 60439 972-2244

Helen Grant
U. S. Department of Energy
1655 Peachtree Street 404/881-3135
Atlanta, Georgia 30309 257-3135

Gabriel Marciante
U. S. Department of Energy
P. O. Box E 615/576-0850
Oak Ridge, Tennessee 626-0850

Robert Mussler
U. S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D. C. 20545 252-6947

Lucy R. Querques
U. S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D. C. 20545 252-9680

Robert H. Strickler
U. S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D. C. 20545 252-4597

ECONOMIC DEVELOPMENT ADMINISTRATION

John C. Cole
Economic Development Administration
Suite 700
1365 Peachtree Street, N.E. 404/881-7667
Atlanta, Georgia 30309 257-7667

HOUSING AND URBAN DEVELOPMENT

Regional Office (Atlanta)

Richard L. Bailey
DHUD, Region IV
75 Spring Street, S.W. COMM. 404/221-5151
Atlanta, Georgia 30303 FTS. 242-05151

Gayle F. Burbidge
DHUD, Region IV
75 Spring Street, S.W. 404/221-5151
Atlanta, Georgia 242-5151

Ivar Iverson
DHUD, Region IV
75 Spring Street, S.W. 404/221-4096
Atlanta, Georgia 242-4096

Russell Jacobsen
DHUD, Region IV
75 Spring Street, S.W. 404/221-4087
Atlanta, Georgia 30303 242-4087

John Ogden
DHUD, Region IV
75 Spring Street, S.W. 404/221-5151
Atlanta, Georgia 30303 242-5151

Alabama

Robert E. Lunsford
Alabama Area Office
15 South 20th Street 205/254-1676
Birmingham, Alabama

Florida

Buddy E. Arbuckle
Jacksonville Area Office
661 Riverside Avenue 904/791-2610
Jacksonville, Florida 946-2610

Robert Crews
Jacksonville Area Office
661 Riverside Avenue 904/791-2610
Jacksonville, Florida 32250 946-2610

Alett Little
Jacksonville Area Office
Room 1016, 100 W. Capitol Street 601/960-5242
Jacksonville, Florida 490-5242

Georgia

James V. Spann
Atlanta Area Office
75 Spring Street
Atlanta, Georgia
COMM. 404/221-4037
FTS. 242-4037

Harry Walls
Atlanta Area Office
75 Spring Street
Atlanta, Georgia 30303
404/221-4036
242-4036

Kentucky

Behram Shroff
DHUD, Louisville Area Office
P. O. Box 1044
Louisville, Kentucky 40201
502/582-6173
352-6173

Tennessee

Richard C. Becker
DHUD, Knoxville Area Office
1111 Northshore Drive
Knoxville, Tennessee 37919
615/558-1344

Carl J. Saine
DHUD, Nashville Service Office
1 Commerce Place Suite 1600
Nashville, Tennessee
615/251-5111
252-5111

Steve Shields
DHUD, Knoxville Area Office
1111 Northshore Drive
Knoxville, Tennessee 37919
615/558-1345
854-1345

Jeraldene White
DHUD, Memphis Service Office
100 N. Main Street
Memphis, Tennessee
901/521-3367
222-3367

OAK RIDGE NATIONAL LABORATORY

Lorene L. Sigas
Oak Ridge National Laboratory
Box X
Oak Ridge, Tennessee 37830
615/574-7266
624-7266

GENERAL SERVICES ADMINISTRATION

A. Elaine Gilbert
General Services Administration
Public Buildings Service
75 Spring Street 404/221-3080
Atlanta, Georgia 30303 243-3080

James L. Smith
General Services Administration
75 Spring Street 404/221-3080
Atlanta, Georgia 30303 243-3080

VETERANS ADMINISTRATION

Jon E. Baer
Veterans Administration
811 Vermont Avenue, N.W. 202/389-2463
Washington, D. C. 20420 389-2463

Willard Sitler
Director, Office of Environmental Affairs
810 Vermont Avenue, N.W. 202/389-2526
Washington, D. C. 20420 389-2526

U. S. ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, D. C.

Thomas R. Sheckells
Deputy Director,
Office of Federal Activities 202/755-0770
Washington, D. C. 20460 755-0770

Kathi Wilson
Office of Federal Activities 202/245-3006
Washington, D. C. 20460 245-3006

COUNCIL ON ENVIRONMENTAL QUALITY

Nancy Nord
722 Jackson Plaxe, N.W. 202/395-5750
Washington, D. C. 20006 395-5750

U. S. ENVIRONMENTAL PROTECTION AGENCY, REGION VII

Robert Fenemore
324 East 11 Street 816/374-2921
Kansas City, Missouri 758-2921

U. S. ENVIRONMENTAL PROTECTION AGENCY, REGION IV, ATLANTA

Charles R. Jeter Regional Administrator	404/881-4727 257-4727
Theodore Bisterfeld EIS Branch	404/881-7458 257-7458
Robert Cooper EIS Branch	404/881-7458 257-7458
Clara J. DeLay EIS Branch	404/881-7458 257-7458
John E. Hagan III Chief, EIS Branch	404/881-7458 257-7458
Louie P. Heard Soil Conservationist - IPA to EPA	404/881-4980 257-4980
Robert B. Howard Chief, EIS Preparation Section	404/881-7458 257-7458
Eric H. Hughes Ecological Review	404/881-7901 257-7901
Stephanie Lankford EIS Branch	404/881-7458 257-7458
Allen Lucas Ecological Review	404/881-7901 257-7901
Ronald J. Mikulak EIS Branch	404/881-7458 257-7458
Gerald J. Miller EIS Branch	404/881-7458 257-7458
Sheppard N. Moore Chief, EIS Review Section	404/881-7458 257-7458
Joe T. McEnerney EIS Branch	404/881-7458 257-7458
Louis Nagler Air & Hazardous Materials	404/881-2786 257-2786
Beverly Poolson Ecological Review	404/881-7901 257-7901

Bradley Nicolajsen Ecological Review	COMM. FTS.	404/881-7901 257-7901
Frank Redmond Public Awareness Branch		404/881-3004 257-3004
Robert Roth Office of Program Integration and Operation		404/881-3776 257-3776
Carl R. Sova Air Programs		404/881-3433 257-3433
Hagan Thompson Public Awareness Branch		404/881-3004 257-3004
Oscar J. Webster EIS Branch		404/881-7458 257-7458
Aurel J. Tolman EIS Branch		404/881-7458 257-7458

PUBLIC HEALTH SERVICE, CENTER FOR DISEASE CONTROL

Robert L. Kay, Jr. Environmental Health Servies Division Atlanta, Georgia 30333	236-6649

FEDERAL EMERGENCY MANAGEMENT AGENCY

Thomas L. Hawkins Federal Emergency Management Agency 1375 Peachtree Street, Suite 778 Atlanta, Georgia 30309	404/881-2391 257-2391
Cheryl Stovall Federal Emergency Management Agency Suite 778, 1357 Peachtree Street Atlanta, Georgia 30309	404/881-2391 257-2391

NATIONAL MARINE FISHERIES SERVICE

Mark Thompson National Marine Fisheries Service 3500 Delwood Beach Road Panama City, Florida	904/234-5061

CONGRESSMAN LEVITAS'S OFFICE

Susan Rowell 141 East Trinity Place Decatur, Georgia	404/377-1717
Mike Sloan 141 East Trinity Place Decatur, Georgia	404/377-1717

STATE GOVERNMENTS

Alabama

Timothy S. Hamilton East Alabama Regional and Development Commission Box 2186 Anniston, Alabama	205/237-6741 229-6942

Florida

Lynn Griffin Florida Department of Environmental Regulation 2600 Blair Stone Road Tallahassee, Florida 32301	904/488-0130
Elizabeth Hodecker Florida Office of the Governor The Capitol Talahassee, Florida 32301	904/488-5551
Walter O. Kolb Florida Office of the Governor The Capitol Tallahassee, Florida 32301	904/488-5551

Georgia

Chuck Badger Georgia State Clearing House 270 Washington Street Atlanta, Georgia 30334	404/656 -3855
G. Robert Kerr The Georgia Conservancy 3110 Maple Drive, Suite 407 Atlanta, Georgia	404/262-1967

Jim Morrison
Georgia Wildlife Federation
4019 Woburn Drive COMM. 404/934-1955
Tucker, Georgia 30084

Susan Shepherd Prosser
McIntosh Trail APDC
P. O. Box 241 404/227-3096
Griffin, Georgia 30224

Jeff Sewell
Georgia Conservancy
Marietta, Georgia

Naomie O. Smith
Georgia Environmental Protection Division
Trinity, Washington Building
Room 825
Atlanta, Georgia 656-4708

Sam Williams
Georgia State Clearinghouse
270 Washingtron Street 404/656-3855
Atlanta, Georgia 30334

Harvey G. Young
Georgia Department of Natural Resources
270 Washington Street
Atlanta, Georgia 30334 404/656-4810

Kentucky

William W. Ahrens
Kentucky Regional Planning and
Development Agency
914 E. Broadway 502/589-4406
Louisville, Kentucky

Rose Marie Carr Clements
Department of Natural Resources
and Environmental Protection
Capital Plaza Tower 502/564-7320
Frankfort, Kentucky

Mississippi

Roger A. Jennings
Mississippi Bureau of Pollution Control
P. O. Box 10385
Jackson, Mississippi 39209 601/961-5171

South Carolina

N. S. Thompson
Lowcounty Council of Governments
P. O. Box 98 COMM. 803/726-5536
Yemassee, South Carolina 29945

Tennessee

Hale Booth
Chattanooga Area Council of Governments
735 Broad Street 615/266-5781
Chattanooga, Tennessee 37402

GEORGIA INSTITUTE OF TECHNOLOGY

College of Architecture, Graduate City Planning Program

Mahmoud S. Al-Zobi
David J. Brown
Patricia Brown
Stanley E. Bufford
Andrea Clute
Thomas L. Coakley
Amelia L. Conrad
Andrea Gernazian
Daniel J. Goerke
Richard E. Greene
James A. Grissett III
Mark S. Hardgrove
Paul M. Jean
Jane Karowski
James S. Macleod
Azuka Ngoddy
Belinda M. Pedroso
Hervy Pereira
Douglas H. Stauffer
Sharon Summers

NONGOVERNMENTAL AGENCIES AND PRIVATE INDIVIDUALS

David A. Adams
Department of Forestry
N. C. State 919/737-2891
Raleigh, North Carolina 27607

Dottie Aiken
EDAW Associates
2000 Clearview Avenue 404/457-0140
Atlanta, Georgia 30340

Ralph L. Bent
P. O. Box 30058 318/459-5132
Shreveport, Louisiana 71130

Gregory Bourne
Claude Terry and Associates
1955 Cliff Valley Way 404/329-0430
Atlanta, Georgia 30332

Dr. Clifford R. Bragdon
Georgia Institute COMM. 404/894-3380
of Technology
Atlanta, Georgia 30332

Steve Buckley
Bechtel Energy Corporation
889 Ridge Lake Bulavard 901/685-3460
Memphis, Tennessee 38138

Alfred G. Bouoni
Battelle Columbus Laboratories
505 King Avenue 614/424-6497
Columbus, Ohio 43201 FTS. 976-6497

Gary Christopher
Engineering-Science, Inc.
57 Executive Park South 404/325-0770
Atlanta, Georgia

Herschel C. Conner, Jr.
H. W. Cochner, Inc.
9720 Executive Center Drive North 813/576-2535
Saint Petersburg, Florida

Ralph E. Cooper
Battelle Columbus Laboratories
505 Ing Avenue 614/424-6497
Columbus, Ohio 43201 976-6497

H. Lee Davis
Conservation Consultants, Inc.
P. O. Box 35 813/722-6668
Palmetto, Florida

Dr. Norbert Dee
Law Engineering
2749 Delk Road 404/952-9005
Marietta, Georgia 30067

Jan E. Dillard
WAPORA, Inc.
5980 Unity Drive 404/447-4433
Norcross, Gerogia 30071

Jack D. Doolittle
Environmental Science and Engineering, Inc.
P. O. Box ESE COMM. 904/372-3318
Gainesville, Florida 32602

Tim Doyle
Dames & Moore
455 E. Paces Ferry Road 404/262-2915
Atlanta, Georgia 30363

Michael J. Dupree
W. R. Grace and Company 901/522-2170
P. O. Box 27147

Michael Farr
Envirosphere
145 Technology Park 404/449-5800
Norcross, Georgia

Edward L. Findley
976 Viscount Court 404/296-0430
Avondale, Georgia 30002

Louise B. Franklin
Claude Terry and Associates, Inc.
1955 Cliff Valley Way, Suite 220 404/329-0430
Atlanta, Georgia 30029

H. Paul Friesema
Department of Political Science
Northwestern University
Evanston, Illinois 60201

R. L. Dick Gensel
P. O. Box 649 404/429-3404
Marietta, Georgia

Frank Groznik
CH2M Hill
P. O. Box 1647 904/377-2442
Gainesville, Florida 32602

Jerome J. Guidry
Post, Buckley, Schuh & Jernigan, Inc.
4720 North Orange Blossom Trail 305/295-4131
Orlando, Florida 32801

Richard Hamann
Center for Governmental Responsibility
University of Florida COMM. 904/392-2237
Gainsville, Florida 32611

William E. Harris
Stottler Stagg and Associates
6650 Powers Ferry Road 404/955-1680
Atlanta, Georgia 30339

James Harrison
Water Quality Specialist
Toxics Waterwatch
730 Peachtree Street, N.E. 404/873-2016
Atlanta, Georgia 30308

R. Michael Hartman
Envirosphere Company
145 Technology Park 404/449-6639
Norcross, Georgia 30338

Paul T. Henslee
Gulf South Research Institute
P. O. Box 14787 504/766-3300
Baton Rouge, Louisiana 70898

Jerry Hitzemann
WAPORA, Inc.
5980 Unity Drive 404/447-4433
Norcross, Georgia 30071

Barbara Hogan
Soil Systems, Inc.
525 Webb Industrial Drive 404/424-6200
Marietta, Georgia 30062

Robert J. Hunter
Claude Terry and Associates, Inc.
1955 Cliff Valley Way 404/329-0430
Atlanta, Georgia 30029

Steve Kangisser
Envirosphere
145 Technology Park 404/449-5800
Norcross, Georgia

E. J. Kazmierczak
Stottler Stagg and Associates
6650 Powers Ferry Road 404/955-1680
Atlanta, Georgia 30339

C. M. Kelly, Ph.D.
International Coal Refining Company
P. O. Box 2752 COMM. 215/481-1154
Allentown, Pennsylvania 18001

Edwin Kramer
1383 Spring Street., N.W. 404/876-3601
Atlanta, Georgia 30367

Paul E. Kueser
Energy Impact Associates
2400 Ardmore Blvd. 415/351-5800
Forest Hills, Pennsylvania 15221

Lloyd G. Laudenschlager
P. O. Box 6567
Fort Worth, Texas 76115

Susan Levin
Water Quality Specialist
Toxics Waterwatch
730 Peachtree Street, N.E. 404/873-2016
Atlanta, Georgia 30308

David Levy
Toxics Waterwatch
730 Peachtree Street, N.W. 404/8732016
Atlanta, Georgia 30308

Jim Little
Dames and Moore 404/262-2915
Atlanta, Georgia

B. Hamilton McDonald
ESE, Inc.
2200 Northlake Parkway 404/482-1528
Tucker, Georgia 30084

Ronald McGregor
Estech, Inc.
410 Cortez Road 813/758-8688
Bradenton, Florida 33507

Ronald McNeill
WAPORA, Inc. 404/447-4433
5980 F Unity Drive

C. G. Meier
Farmland Industries
P.O. Box 960 813/533-1141
Bartow, Florida 33830

Dr. John Charles Nemeth
CH2M Hill
401 W. Peachtree Street, N.W. 404/588-1990
Atlanta, Georgia 30308

Mike Opalinski
Seminole Electric Cooperative, Inc.
P. O. Box 17100 813/933-7406
Tampa, Florida 33682

Charles A. Perry
Attorney at Law
Elarbee, Clark and Paul
229 Peachtree Street, N.W. 404/659-6700
Atlanta, Georgia 30043

Jack H. Pyburn
EDAW Associates
2000 Clearview Avenue, N.E. 404/457-0140
Atlanta, Georgia 30340

H. Clayton Robertson
Conservation Consultants, Inc.
P. O. Box 35 813/722-6668
Palmetto, Florida

R. R. Ross
Seminole Electric Cooperative, Inc.
P. O. Box 17100 813/933-7406
Tampa, Florida 33682

Thomas N. Sargent
Engineering-Science
51 Executive Park S # 590 404/325-0770
Atlanta, Georgia 30329

William A. Schimming
CF Industries, Inc.
P. O. Box 1480 813/533-3181
Bartow, Florida 33830

Lowell A. Schuknecht
Envirosphere Company
145 Technology Park 404/449-5800
Norcross, Georgia 30092

Charles Seabrook
The Atlanta Journal 404/526-5342

Robert Stephens
WAPORA, Inc.
5890 Unity Drive COMM. 404/447-4433
Norcross, Georgia 30071

M. E. Strachn
615 Holly Ridge Drive 601/634-5429
Vicksburg, Mississippi 39180

Rob Sumner
Georgia Business and Industry Association
181 Washington Street, S.W. 404/659-4444
Atlanta, Georgia 30303

Claude Terry
Claude Terry and Associates, Inc.
1955 Cliff Valley Way 404/329-0430
Atlanta, Georgia 30029

P. Don Weaver, Jr.
Resource Planning, Inc
P. O. Box 82528 813/949-2631
Tampa, Florida 33682

Brian Winchester
CH2M Hill, Inc.
P. O. Box 1647 904/377-2442
Gainesville, Florida 32601

Charles P. Younce
Jack Elam - Cone Mills Corporation
1201 Maple Street 919/379-6449
Greensboro, North Carolina 27405

Don L. Young
The Environmental Licensing Group, Inc.
P. O. Box 12269 904/432-3411
Pensacola, Florida 32581